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THE CONCEPT OF HEARSAY
WITH PARTICULAR EMPHASIS ON
IMPLIED HEARSAY ASSERTIONS

Andrew Peter Paizes

A Thesis Submitted to the Faculty of Law
University of the Witwatersrand, Johannesburg
for the Degree of Doctor of Philosophy

Johannesburg 1983

TO MOM, DAD, ALEX AND ANITA

DECLARATION

I declare that this thesis is my own, unaided work. It is being submitted for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

Andrew Rayes

15th day of December 1983.

PREFACE

Some years ago, while I was still an undergraduate student, I had occasion to assist my father, who was then involved in legal practice, on a matter that raised a difficult point of law. It concerned the scope of the hearsay rule and the applicability of one of the common-law exceptions to the rule. Having little knowledge of hearsay law, I consulted the major texts on the subject, but what I found there only increased my sense of bewilderment. The hearsay rule, I remember thinking, was certainly an odd part of our law. At any rate, with my legal studies imminent, enlightenment was surely at hand. A few years later, and a course in the Law of Evidence richer, I was ruefully to recognize that the hearsay concept remained, for me, an enigma. It seemed, moreover, that the full complexities of the hearsay rule were not taken very seriously in practice, an attitude which I found rather puzzling in the light of the long tenure the rule has enjoyed in the Anglo-American evidentiary system. Something, it was clear, was seriously wrong with the common law, and I resolved to find out what it was. This thesis is the result of that resolution.

I wish to express my heartfelt appreciation to my supervisor, Professor David Zeffertt, for his invaluable

advice and insight, to Mrs Stella Beyleveld for her willing and excellent work in typing the thesis, and to the members of my family for their help in proof-reading the drafts and for their moral support. I am indebted, also, to the Australian Law Reform Commission for their swift and helpful co-operation in making available to me copies of their Research Papers on the reform of the hearsay rule in Australia.

Johannesburg
December 1983

Andrew Paizes

THE CONCEPT OF HEARSAY WITH PARTICULAR EMPHASIS ON IMPLIED HEARSAY ASSERTIONS

PAIZES, Andrew Peter, Ph.D University of the Witwatersrand, 1983

This thesis explores the reasons for the frustration and confusion elicited by the hearsay rule and seeks to remedy the problem by proposing possible ways of improving the present state of the law. The rule is critically examined from three separate angles, its historical origin, its rationale and its scope, and the following submissions are made:

(i) The hearsay rule is largely a product of the adversary system of trial procedure.

(ii) Hearsay is generally excluded because its admission would violate the values served by that system, in that the adversary would be denied access to those standard procedural devices to which a witness is normally subjected.

(iii) The exclusion of hearsay evidence is thus only justifiable if the prejudice caused to the adversary and the prestige of the fact-finding process exceeds its probative value.

(iv) The inflexible exclusionary rule of the common law, qualified as it is by a host of equally inflexible exceptions, does not square with this conception of hearsay and is thus unsatisfactory.

(v) The courts, appreciating the untenable state of the common law, have sought to mitigate its effect by resorting to a narrow definition of hearsay which, in effect, excludes from the scope of the rule evidence of so-called "implied assertions"; such evidence, however, shares the same dangers or testimonial infirmities as that evidence which is excluded, thus causing a distortion of the hearsay concept.

The artificial definition of hearsay and the rigid exclusionary rule at common law emerge therefore as the main reasons for the present impasse. The thesis accordingly concludes with draft proposals for the reform of the law in South Africa in which:

(a) hearsay is defined as evidence raising particular dangers, thus bringing within its purview implied assertions; and

(b) the admissibility of hearsay evidence is governed by a judicial discretion which, although not fettered, is guided by criteria which seek to entrench the values served by the adversary trial.

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1. All references are to page numbers.
2. Underlined references indicate that the case is dealt with more fully, or that the facts of the case or critical commentary may be found at those pages.
3. "n" denotes note. Thus, for instance, 19n is a reference to a note appearing on page 19.

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LIST OF ABBREVIATIONS

LEGAL PERIODICALS

ALJ	Australian Law Journal
CILSA	Comparative and International Law Journal of Southern Africa
Crim L Bull	Criminal Law Bulletin
Crim L R	Criminal Law Review
FRD	Federal Rules Decisions
Harv L R	Harvard Law Review
LJ	Law Journal
LQR	Law Quarterly Review
LR	Law Review
SALJ	South African Law Journal
THRHR	Tydskrif Vir Hedendaagse Romeins - Hollandse Reg
UCD LR	University of California, Davis, Law Review
UCLA LR	University of California, Los Angeles, Law Review

LAW REPORTS

(a) Australia

ALR	Argus Law Reports
CLR	Commonwealth Law Reports
SASR	South Australian State Reports
Tas SR	Tasmanian State Reports
VLR	Victorian Law Reports

(b) Canada

CCC	Canadian Criminal Cases
CPR	Canadian Patent Reporter
CR	Criminal Reports
DLR	Dominion Law Reports
Fox Pat C	Fox's Patent Cases
OR	Ontario Reports

Canada Cont'd

SCR	Supreme Court Reports
WWR	Western Weekly Reports

(c) New Zealand

NZLR	New Zealand Law Reports

(d) United Kingdom

AC	Appeal Cases, House of Lords and Privy Council
Ad & El	Adolphus and Ellis's Reports, King's Bench and Queen's Bench
All ER	All England Law Reports
App Cas	Appeal Cases, House of Lords and Privy Council
Camp.	Campbell's Reports
Ch.D	Chancery Division Law Reports
El & Bl	Ellis and Blackburn's Queen's Bench Reports
ER	English Reports
LT	Law Times Reports
M & S	Maule and Selwyn's Reports, King's Bench
M & W	Meeson and Welsby's Reports. Exchequer
P	Probate, Divorce and Admiralty Division
QBD	Queen's Bench Division
RPC	Reports of Patent Cases
WLR	Weekly Law Reports

(e) United States

A.	Atlantic Reporter
Cranch.	Cranch's United States Supreme Court Reports
CRNS	Code Reports, New Series, New York
Cush.	Cushing's Massachusetts Reports
F.	Federal Reporter
F. Supp.	Federal Supplement
N.E.	North Eastern Reporter
N.W.	North Western Reporter
NYS	New York Supplement
P.	Pacific Reporter

United States Cont'd

Pet.	Peter's United States Supreme Court Reports
So.	Southern Reporter
S.E.	South Eastern Reporter
S.W.	South Western Reporter
U.S.	Reports of Cases in the Supreme Court of the United States
USPQ	United States Patent Quarterly
2d	Second Series

Chapter I

INTRODUCTION

In 1842, Simon Greenleaf looked at the law of evidence as a whole and was favourably impressed with what he saw. He wrote:

> "The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor from the manner of treatment; and will rise from the study of its principles, convinced, with Lord Erskine, that 'they are founded in the charities of religion - in the philosophy of nature - in the truths of history - and in the experience of common life.'" [1]

As Morgan puts it: "God was in His procedural heaven and all was right with the world of evidence".[2] Half a century later, however, this euphoria had evaporated - so much so that Thayer was moved to write:

> "I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, while settling practical questions, in presiding over courts where ordinary, untrained citizens are acting as judges of fact. Largely irrational in any other aspect, in this point of view it is full of good sense; - a good sense, indeed, that occasionally nods, that submits too often to a mistaken application of its precedents, that is often short-sighted and ill-instructed, and that needs to be taken in hand by the jurist, and illuminated, simplified, and invigorated by a reference to general principles." [3]

One of the major causes of this disenchantment was the hearsay rule, which, Thayer found, presented "an instruc-

tive spectacle of confusion".[4] He added:

> "Now a great deal of perplexity exists, in the law relating to hearsay, from a failure to understand the scope of [the] exceptions; and from an uncertainty whether and how far they are to be freely developed, or to be strictly limited, as being mere exceptions, while the main rule itself which prohibits hearsay is expanded."[5]

Today the law journals and text-books abound with criticisms of the hearsay rule. The following represent a random sample:

— "The rule against hearsay, together with its many exceptions, is probably the best known, and at the same time, the least loved of the Anglo-American rules of evidence".[6]

— "The present evidence rules fall short of providing a satisfactory solution to the hearsay problem. They exclude evidence that has a higher probative force than evidence they admit [and] [t]hey fail to provide adequate procedural devices to minimize the possibility of misjudging the probative force of hearsay admitted".[7]

— "Many lawyers and judges view hearsay in the same manner that Winston Churchill viewed the action of Russia in 1939 when he said, 'It is a riddle wrapped in a mystery inside an enigma.' While the hearsay rule is probably the most widely known rule of evidence - to both lawyers and laymen - it is surely the most frequently misunderstood and misapplied."[8]

"There are undoubtedly no other rules of evidence that so consistently baffle and frustrate students of evidence, be they law students, trial lawyers or judges, as much as the hearsay rule and its myriad exceptions. Even the gordian knot, presumptions and burden of proof, presents less frustration ... " [9]

To what may this volteface be attributed? According to Mc Cormick, the answer may be found by examining the rôle of the jury in shaping our evidentiary rules. He wrote:

> "The jury no longer is looked on as an essential in our ideal of a trial, but it is the presence of the jury that has shaped the pattern, with its characteristic feature of production of oral proof by the parties, in waves of attack, counter-attack, and repulse, with its atmosphere of conflict, so clearly manifested in the traditional hostility of tone of the cross-examiner, and with its process of attempting to sift out the chaff in the testimony on the spur of the moment by objections and rulings according to rules that must be invoked and applied on the run.
>
> These influences have determined the character of the extensive body of doctrine known as the law of evidence. Many of its notions originated in early rulings of English judges at nisi prius, and it still tends to be formulated in terms of rules of sharp outline, rather than in terms of wider standards. A century of reporting of evidence points and of the writing of evidence texts has multiplied these rules and filigreed them with distinctions and exceptions. When applied at all in the trial court, they are applied as they were originally designed to be, that is, rather inflexibly. This tradition of crisp analysis, and the usability of the rules for dogmatic solutions makes them a happy feeding ground for the law schools. As taught, the law of evidence furnishes for the milk teeth of the law student, an abundance of those hard problems which are

> supposed to be so invigorating, but which often seem beyond the infant's powers of mastication." [10]

On comparing the theory of the law with the way the rules of evidence were applied in the courts, moreover, the learned author found a "strange disparity":

> "The lush exuberance of doctrines which bloom in the digests and the six-volume treatises on evidence, and the sharp quiddities of the class room, though they were fairly well known to the advocate of a generation ago, are not familiar ground to the average successful trial lawyer of today. To master these rules so that they could actually be used, to retain them, and to keep abreast of their changing current, would be a mammoth task, and one which as a practical man he believes is not worth the cost. Of what use to learn Culbertson's canons of bidding at bridge, unless your partner knows them also? For even the trial judges today, with notable exceptions, have only a discreet bowing acquaintance with the evidence rules." [11]

Our treatment of hearsay evidence has, therefore, entangled us in what one commentator has described as an "unintelligible thicket".[12] In this dissertation I shall endeavour:

(a) to examine critically the origin, rationale and scope of the rule against hearsay;

(b) to probe the weaknesses in the present state of the law; and

(c) to submit tentative proposals for its reform.

In the pursuit of these objects, I shall use, as an analytical tool, the concept of implied assertions. This

topic, which lies in the twilight zone of hearsay, has long vexed academic and practical lawyers, and, in the process, impeded a clear vision of the hearsay concept.

NOTES TO CHAPTER I

1 Simon Greenleaf Evidence (1842) para 584.

2 Edmund M Morgan "The Future of the Law of Evidence" (1951) 29 Texas LR 587 at 588.

3 James Bradley Thayer A Preliminary Treatise on Evidence at the Common Law (1898) 509.

4 Id at 523.

5 Id at 521.

6 Paul J Brysh "Abolish the Rule Against Hearsay" (1974) 35 University of Pittsburgh LR 609 at 609.

7 Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 331.

8 Kenneth W Barton and Richard G Cowart "The Eni[illegible]ay" (1978) 49 Mississippi LJ 31 at 32.

9 Josiah H Blackmore II "Some Things About Hearsay: [illegible]icle V111" (1977) 6 Capital University LR 597 at 597.

10 Charles T Mc Cormick "Tomorrow's Law of Evidence" (1938) 26 American Bar Association Journal 507 at 508.

11 Ibid.

12 John M Maguire "The Hearsay System: Around and T[illegible]gh the Thicket" (1961) 14 Vanderbilt LR 741 at 741.

CHAPTER II

ORIGIN OF THE HEARSAY RULE

Is the hearsay rule the "product of the adversary system" or the "child of the jury"? This debate, which has illustrious participants ranged on opposing sides, is dismissed by McCormick on the basis that it "may be of no great contemporary significance".[1] In countries where trial by jury is the norm, this comment may be valid, but, in a country such as South Africa, where jury trials have been abolished, the question assumes more than mere academic importance. If the hearsay rule is a legacy of the jury trial, then there would seem to be no sound historical basis for its retention in non-jury systems. If, however, it is the progeny of the adversary system, then the argument for abolishing the hearsay rule in jury systems, but retaining it in non-jury jurisdictions, would be fallacious.

It is not my intention to embark on a comprehensive analysis of the history of the hearsay rule, as the literature is well-served by many excellent accounts of this intriguing topic [2] - one thinks particularly of the outstanding contribution by Wigmore [3] in his Treatise on the Anglo-American system of evidence - and it would be both presumptious and tautologous to attempt a similar exercise. However, in order to answer the above question, or, at least, to appreciate the debate to which it has given rise, it is necessary to consider briefly the major stages in its development.

According to Wigmore,[4] the hearsay rule as we know it today, evolved through three distinct phases:

I. Up to the mid-1500s : Until the middle of the 16th century, Wigmore observes, no objection was seen to the use by the jury of testimonial statements by persons not in court. During this period, the fact-finding process was characterized by a practice of obtaining information from persons not called to testify. This constituted the primary source of material for the jury, and the witness, as it is understood today, was "a rare figure, just beginning to be known".[5]

II. From the mid-1500s to about 1700 : During this period, in the words of the learned author,

> "a sense arises of the impropriety of such sources of information, and the notion gradually but definitely shapes itself, in the course of hard experience, that the reason of this impropriety is that all statements to be used as testimony should be made only where the person to be affected by them has an opportunity of probing their trustworthiness by means of cross-examination".[6]

What caused this change in attitude? Wigmore identifies two main factors:

(a) The jury came to rely to an increasing extent on evidence presented to it in court by witnesses, until, by the early 1600s, this had become the chief source of information. In 1650, in Bennett v Hartford,[7] it was held that "if either of the parties to a trial desire that a juror may give

evidence of something of his own knowledge to the rest of the jurors, the Court will examine him openly in Court upon his oath and he ought not to be examined in private by his companions". The practice of jurors relying on their own private knowledge, however, continued until 1816, when it received its quietus in R v Sutton.[8]

(b) Owing to the increased reliance placed on the testimony of witnesses, the jury began to concern itself about the number of witnesses required to prove a fact and the sufficiency, in both quantity and quality, of their evidence. It came, therefore, to be asked "whether a hearsay thus laid before them would suffice",[9] and the notion evolved that a hearsay statement was not alone sufficient, but could be used to corroborate or confirm other evidence.

(III) From the early 1700s onwards : This period saw the "general and settled acceptance" of the hearsay rule, and whereas decisions in the early part of the 18th century expressed a certain tentative unsureness about its tenure, by the middle of the century it was viewed as something "no longer to be struggled against".[10]

Commenting on this development, Thayer was prompted to remark that the English law of evidence was "the child of the jury",[11] and that "the greatest and most remarkable offshoot of the jury was that body of excluding rules

which chiefly constitute the English 'Law of Evidence'".[12] It is important to note, however, that Thayer seemed to have understood the term "jury" as encompassing a concept somewhat broader than merely that system of procedure whereby a jury - as opposed to a judge or any other judicial officer - is instituted as the trier of fact. This is evident from his qualification of the above observation, viz. that "[i]f the petit jury had kept up the older methods of procedure, ... - if, instead of hearing witnesses publicly, under the eye of the judge, it had heard them privately and without any judicial supervision, it is easy to see that our law of evidence never would have taken shape". Thayer's conception of jury trial procedure, then, constitited a system whereby a witness gave his testimony in open court, subject to judicial safeguards that ensured accuracy and fair process, and in the presence of the adversary.

Despite this qualification, the notion that the hearsay rule is the "child of the jury" seems to have survived in its more literal form, and Baker records that "[a]part from one or two exceptions ... every one is agreed that the Hearsay rule is the product of the jury system of trial".[13] One of the few writers to take issue with this prevailing view is Prof. Edmund Morgan,[14] who maintains that it is a proposition that was foisted upon the rule by the judges and writers of the nineteenth century. The birth of the hearsay rule, according to Morgan, does not accompany the transition from trial by ordeal and compurgation to trial by jury, but rather the progression

from an investigative or inquisitorial proceeding to an adversary proceeding. Referring to the approach of the courts in this regard, the learned author states:

> "The early and late cases ... seem to me to warrant the conclusion that it is more than a coincidence that the evolution of the hearsay rule synchronizes with the evolution of our system from an investigative to an adversary system, and that as early as 1696 we find not lack of cross-examination but lack of opportunity to cross-examine stated as a reason for the exclusion of hearsay." [15]

In support of this contention, he adds that the two principal reasons advanced by the courts for the exclusion of hearsay - viz. the lack of the oath and the absence of the opportunity to cross-examine the declarant - were intended primarily to protect the adversary, and had little to do with the jury. It might, he continues, be argued that the jury "must have the benefit of a cross-examination of all statements offered to induce pursuasion as to the facts",[16] but this argument is fallacious, as (i) the adversary may waive cross-examination and (ii) the judge is not required to cross-examine, and, indeed, where he does so, he must exercise the greatest circumspection. Accordingly, Morgan concludes, because no official inquisitor is provided, "the jury may ... be required to do its best (or worst) with testimony that has not been purified by this greatest of truth-revealing devices". On the other hand, he adds, "the adversary may not be compelled to forego cross-examination". [17]

Baker [18] criticizes Morgan's views on the grounds that (a) his attempts to "explain away the many statements of judges

and textbook writers in the nineteenth century that the Hearsay rule owes its origin to the jury, as being fallacious and foisted upon the rule"[19] overlooks the fact that "this was the general view in the nineteenth century and seems so at the present time"; and (b) the rule has its origins considerably earlier than the seventeenth century, indicating that Morgan's theory is not borne out by the historical background of the rule. Even if Baker's second comment is true, viz. that Morgan's "adversary theory" lacks historical support, it is clear that the "jury theory" is similarly deficient. As Morgan points out, this latter view "seems never to have been suggested until about the second quarter of the nineteenth century", whereas, as was shown above, the hearsay rule had crystallized by the beginning of the eighteenth century. Trial by jury, moreover, had been operative in England since soon after the Norman Conquest of 1066; if the hearsay rule <u>was</u> the "child of the jury", it was certainly a protracted and painful birth. It is submitted that it is more realistic to see the emergence of the rule as a product of two interdependent factors : first the flowering of the adversary system of trial procedure, which may be considered the spark, or direct cause of its development, and secondly the jury system, which may be seen as the catalyst in this historical melting-pot. As Baker puts it, "[i]t cannot be denied that many of the facts will fit either theory", and the "absence of the Hearsay rule on the Continent can be attributed as well to the absence of the jury as to the in-

vestigative nature of the trials there".[20]

The abolition of jury trials in South Africa is, therefore, not automatically a signal for the abolition of the hearsay rule. The rule is primarily a servant of adversary trial procedure, and to allow the free reception of hearsay without considering its effect on its hallowed master, would be both rash and dangerous. It has been argued by Prof. Stanley Schiff,[21] another advocate of the adversary theory, that the rule makes good sense within the workings of the adversary system, and that any attempt to create a broader basis for the admissibility of hearsay must take account of the dictates of that system. It would be prudent, therefore, to take cognizance of this caveat, and to keep in mind the origin and historical function of the hearsay rule before embarking on a programme of reform. For reform is both essential and inevitable, and our legislature should not be deterred from this path by a natural reluctance to tamper with "that most characteristic rule of the Anglo-American law of Evidence";[22] as McCormick observed, "the rule against hearsay taking form at the end of the seventeenth century was neither a matter of 'immemorial usage' nor an inheritance from Magna Carta but, in the long view of English legal history, was a late development of the common law".[23]

NOTES TO CHAPTER II

1 C T Mc Cormick Handbook of the Law of Evidence 2ed (1972) 581.

2 See, for instance, Wigmore Evidence V 3ed (1940) para 1364; John H Wigmore "The History of the Hearsay Rule" (1904) 17 Harvard LR 437; Mc Cormick op cit note 1 at 579-581; Baker The Hearsay Rule (1950) 7-12; Edmund M Morgan "The Jury and the Exclusionary Rules of Evidence" (1937) 4 University of Chicago LR 247, "The Hearsay Rule" (1937) 12 Washington LR 1, and "Hearsay" (1953) 25 Mississippi LJ 1; Edmund M Morgan and John MacArthur Maguire "Looking Backward and Forward at Evidence" (1937) 50 Harvard LR 909 at 918-922; and Thayer A Preliminary Treatise on Evidence (1898) at 518-523.

3 Wigmore Evidence V 3ed (1940) para 1364.

4 Ibid.

5 Ibid.

6 Ibid.

7 (1650) Style 233.

8 (1816) 4 M & S 532. See also Baker, op cit note 2, at 10.

9 Wigmore op cit note 3.

10 Ibid

11 Thayer, op cit note 2, at 47.

12 Id at 180.

13 Baker, op cit note 2, at 7.

14 Edmund M Morgan, see references in note 2.

15 Edmund M Morgan "The Hearsay Rule", op cit note 2, at 3.

16 Ibid.

17 Ibid.

18 Baker, op cit note 2, at 11-12.

19 Id at 11.

20 Ibid.

21 Stanley Schiff "Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Canadian Bar Review 674.

22 Wigmore op cit note 3.

23 Mc Cormick, op cit note 1, at 581.

Chapter III

THE RATIONALE OF THE HEARSAY RULE

The discussion in this Chapter will take the form of two separate enquiries, each of which is considered in a separate section:

Section A : What reasons are advanced for excluding hearsay?

Section B : Do these reasons in fact warrant the exclusion of hearsay?

It may be seen, therefore, that the enquiry in Section A rests on the underlying premiss that hearsay is generally excluded, and the focus falls on the reasons that have been advanced for this exclusion. This necessitates an investigation into the basic values which the hearsay rule serves to protect and its rôle in the adversary system that spawned it. Section B, on the other hand, involves a questioning of the basic premiss of exclusion, and involves assessing whether in fact the protection of the values identified in Section A warrants an exclusionary rule : Is the exclusion of all, some, or even any hearsay justifiable in the light of the reasons advanced for such exclusion?

SECTION A : WHY IS HEARSAY EXCLUDED?

Baker,[1] after a "fairly careful search of the cases and the textbooks"[2] identifies the following ten reasons:

"(a) Because it is irrelevant.

(b) Because of the dangers arising from the repetition of statements.

(c) Because of the undue protraction of trials its reception would result in.

(d) Because of the possibilities of fraud.

(e) Because hearsay evidence possesses 'an intrinsic weakness.'

(f) Because its rejection encourages stronger for weaker proofs.

(g) Because its exclusion prevents surprise and unfair prejudice to the parties.

(h) Because its exclusion prevents the jury being confused and misled.

(i) Because the testimony is not given on oath.

(j) Because there is no opportunity to cross-examine the maker of the statement." [3]

The first of these reasons Baker rejects out of hand, arguing, correctly, it is submitted, that in many cases hearsay has considerable probative value but is nevertheless not received. As Baron Parke said of the rule in Wright v Tatham: [4] "Its operation clearly proves that in some cases it excludes the proof of matter which, but for it, would be regarded not only as relevant to particular facts but as good grounds for believing in their existence." In Phipson On Evidence, [5] the distinction between the criteria for rejecting hearsay evidence on the one hand and irrelevant evidence on the other hand, is well put: "The doubt and suspicion attending (hearsay) are a doubt and suspicion

attaching to its accuracy, and are wholly distinct from the reasons excluding facts as not tending to prove the matter in issue, which are based upon logical inference."

Baker also rejects (f),[6] a reason which he claims is based unjustifiably on the view that the hearsay rule is part of the Best Evidence rule. In South Africa, this theory of the hearsay rule has been rejected by the Appellate Division in Vulcan Rubber Works (Pty) Ltd v SAR & H.[7]

As regards the remaining eight reasons, it is submitted that these traditional arguments justifying the rule against hearsay fall into four distinct categories:

— Those reasons which have as their basis the fact that hearsay evidence cannot be tested or evaluated by means of those standard courtroom devices which characterize our adversary system of trial procedure. (See (i) and (j) above.)

— Those reasons which emphasize the intrinsic weaknesses of hearsay evidence, i e the dangers which are inherent in hearsay but which are not normally associated with original evidence. (See (b) and (e) above.)

— Those reasons which view all evidence as containing certain latent dangers or infirmities, but which maintain that these dangers are particularly strong in the case of hearsay because of the absence of the procedural safeguards mentioned above. (See, for instance, (d) above.)

— Those reasons which stress the inconvenience that the reception of hearsay would cause to trial procedure. (See (c), (g) and (h) above.)

Each of these categories merits closer attention, as the scope and nature of the hearsay rule can only be properly understood in its true perspective if the reason for its existence is appreciated. In what follows, therefore, an attempt will be made to explain, illustrate and assess each of these four factors, thereby exposing the set of values on which hearsay theory rests and preparing the way for an investigation into the nature of the hearsay concept and the deficiencies of the hearsay rule.

(A) <u>The inconvenience caused to efficient trial procedure</u>:

Baker submits that the admission of hearsay would give rise to the following disadvantages:

(i) The undue protraction of trials: If hearsay were freely admissible, he argues, it would "open up fields of inquiry and call for the production of witnesses that would never have been necessary if such hearsay had been excluded".[8]

(ii) Unfair prejudice and surprise would be caused to the opposing party: This flows from the fact that the other party would not be able to prepare its briefs sufficiently for all eventualities.

(iii) The jury would be confused and misled, and the evidence could enjoy an exaggerated or disproportionate degree of influence or weight on their untrained minds. This theory received considerable judicial

support in England,[9] although it cannot, of course, be invoked to justify the retention of the rule in those jurisdictions where trial by jury is no longer operative.

It is submitted, however, that the first two factors are more properly considered in relation to the rules regarding relevance. All evidence, in order to be admissible, must be "legally relevant" in the sense that it must be sufficiently relevant to outweigh the undesirable effects of its reception. As Hoffmann and Zeffertt[10] put it, legal relevance is a function of two variables, viz. the probative force of the evidence and the disadvantages it would cause by way of prejudice, confusion, the need to investigate lengthy collateral issues or the need to consider difficult questions of credibility. In the words of Nicholas J,[11] this conception of relevance would allow evidence that is logically probative to be received "provided that it is not oppressive or unfair to the other side, and that the other side had fair notice of it and is able to deal with it."

It is submitted, therefore, that these two factors should be subsumed into the enquiry concerning the relevance of the evidence, and should not be considered an <u>independent</u> reason for the justification of the hearsay rule. Not all hearsay raises these difficulties, and, where it does, they may be considered together with all the other circumstances, in determining whether the probative value exceeds the disadvantages and prejudicial effect of the evidence.

The third factor concerns possible dangers that may be

latent in the evidence and that may not be properly identified owing to the absence of cross-examination and the other standard procedures normally available to a court. This objection is therefore more properly considered in (C) and (D) below.

(B) Hearsay contains intrinsic dangers or weaknesses that are not normally present in original testimony :

Consider the following situation: X is charged with exceeding the speed limit. The prosecution calls a witness, W, who testifies that he spoke to Y, who was a passenger in X's car at the time, and that Y said to him, "X was speeding". What dangers are involved in receiving this evidence? Clearly there is the danger that Y might have been lying or mistaken, dangers relating to Y's sincerity, memory or powers of perception. These dangers, however, are present in all evidence, whether hearsay or original: even if Y were to testify himself, there would be no assurance that he had not intentionally or honestly misrepresented the facts. The difference, however, lies in the opportunity which the adversary has to reveal, assess and probe these dangers. Where Y testifies personally, he does so subject to the oath, in open court, and in the presence of the adversary (the accused), where his demeanour may be scrutinized, where he must answer questions which together make up a coherent whole, and where he is subject to cross-examination by the accused or his legal representative. Where he does not testify personally, and the court is required to rely on W's account of Y's narrative, these procedural

safeguards are not available to the court or to X. The dangers, nevertheless, are the same; it is only the method of exposing them that is different. These testimonial dangers, which are latent in all evidence, will be considered separately in (C) below. What remains to be ascertained is whether hearsay contains "intrinsic" dangers or weaknesses that are not normally present in original evidence but that arise purely from the nature of a hearsay assertion.

In Mima Queen v Hepburn,[12] Marshall CJ said the following of hearsay: "Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible." And Story J in Ellicott v Pearl [13] was of the view that "it is peculiarly liable to be obtained by fraudulent contrivances, and above all that it is exceedingly infirm, unsatisfactory, and intrinsically weak in its very nature and character." Furthermore, Fletcher J in Lund v Tyngsborough [14] emphasized the "danger that casual observations would be misunderstood, misremembered, and misreported".

In short, then, these objections are to the effect that hearsay, by its very nature as an intra-curial recollection, of an extra-curial act or statement by a person not before the court, has a peculiar susceptibility to fraudulent and honest errors in transmission.

(i) Fraudulent errors in transmission: Wigmore [15]

explains this objection as meaning "that oral utterances of the sort can by false witnesses be placed in the mouth of absent persons", and Baker [16] states the argument as follows: "How easy it would be, it is said, to manufacture false statements as if coming from reputable persons and adduce them through the mouths of unscrupulous witnesses." Both authors, however, reject this reason, primarily because it does not explain the exclusion of written hearsay statements or the admissibility of other oral evidence (such as admissions or the res gestae) which raise the same problem. It is submitted, however, that these arguments are not totally convincing: the fact that this reason alone cannot justify the existence of the hearsay rule in its present form does not necessarily imply that it does not form one of the threads in the entire argument. As Baker [17] points out, the reasons for excluding hearsay should not be considered separately, but rather as a connected set of interdependent factors. By identifying the weaknesses of hearsay, a better understanding of this network is possible.

(ii) Honest errors in transmission: This argument has caused a great deal of academic debate. The authors of McCormick's Handbook on the Law of Evidence express the view that hearsay is particularly vulnerable to errors in transmission, adding that "the reporting of words spoken is subject to special dangers of inaccuracy beyond the fallibility common to all reproduction from memory of matters of observation". [18] The learned authors dismiss Wigmore's

criticism of this contention as being inconclusive, remarking that this criticism merely outlines the failure of the existing rule to distinguish between written and spoken hearsay. As regards oral non-hearsay statements, such as legally operative utterances (e g words of offer and acceptance or defamatory statements), the learned authors concede that the dangers of errors in transmission are similar to those in oral hearsay, but submit that the admissibility of the former statements is explained by the greater need for their proof. It is submitted, however, that their reception may be explained on far more cogent grounds, viz. the fact that their evidential value does not rest on an evaluation of the credibility of the absent declarant. The dangers that will be considered in category (C) below, therefore do not arise, as is the case in oral hearsay statements, and the absence of the standard procedural devices does not materially affect their value as evidence. Even if it were conceded, therefore, that both hearsay and non-hearsay evidence of extra-curial oral statements raised similar dangers of error in transmission, a logical basis could still be found for justifying the exclusion of the former and the reception of the latter. Put differently, it does not follow that this danger is not a valid reason - as distinct from the only reason - for excluding hearsay merely because other types of evidence, which are admissible, share the same or similar dangers.

Lempert and Saltzburg,[19] however, are of the view that the danger of error in transmission is in fact normally greater in the case of oral hearsay than non-hearsay statements,

submitting that Wigmore has failed to appreciate the following important differences between the two:

a. Hearsay statements are generally single statements, and the danger of honest mistakes about crucial matters is greater when a single statement is reported than when a complex one is related. If, for instance, Y tells W, "X was speeding", and W hears the statement as "X was not speeding", then the single word "not" is capable of reversing the meaning of the single assertion. On the other hand, the failure to appreciate one detail of a complex set of facts is not likely to be as crucial, especially since other evidence may normally be used to fill the gaps. The dangers are increased, it is argued, where the error in reporting is an honest one, as then the oath and observation of W's demeanour will not assist in revealing the mistake.

b. Cross-examination is likely to be less effective in exposing mistaken reports of out-of-court statements than other mistaken testimonial claims. This is particularly true when the witness is intentionally misrepresenting the facts, as the lying witness does not have to fit his assertion into a consistent set of supporting facts (as, for instance, would an eye-witness), but can hide behind the impermeable veil of someone else's credibility. Thus, whereas an eye-witness would have to present a consistent and satisfactory account of all the facts that he himself had perceived, a hearsay witness, relying on what someone else said or

did, need offer no explanation for any inconsistencies and may escape further probing by affirming that he knows nothing more than what he was told. This freedom from testimonial responsibility would reduce substantially the efficacy of cross-examination in uncovering untruths.

c. Because hearsay statements involve assessing the credibility of two declarants instead of one, difficult questions may arise as to the weight to be attached to the evidence. If, for example, the court were to decide that a witness's report of an out-of-court declaration was, say 70 per cent reliable, and the out-of-court declaration had, say, a 50 per cent chance of being correct, then what weight should be given to the composite assertion? Clearly the problem is not capable of a mathematical solution, but will be decided on intuition, which is likely to be unreliable.

In an attempt to assess the errors that are made in the transmission of hearsay evidence, Bartlett [20] conducted the following experiment: he presented a short prose selection to various people who, after reading it twice, conveyed the contents to other people who had not read it, and they in turn did the same. He found that the quality of the reproduction deteriorated as it passed through the various phases of repetition; even in one-step reproductions, the degree of distortion was significant. The nature of these distortions he described as follows:

> "Epithets are changed into their opposites; incidents and events are transposed; names and numbers rarely survive intact for more than a few reproductions; opinions and conclusions are reversed - nearly every possible variation seems as if it can take place, even in a relatively short series. At the same time, the subjects may be very well satisfied with their efforts, believing themselves to have passed on all important features with little or no change, and merely, perhaps, to have omitted unessential matters." [21]

The latter observation is of particular interest, as it shows that cross-examination will be of limited value in extracting from a hearsay witness the correct version of a declarant's statement. Bartlett also found

> "that proper names and titles are especially unstable; that there is a strong tendency to develop a concrete version of the account with the result that general opinions, reasoning, and arguments are transformed and omitted; that the language is transformed into more conventional and popular phrases; that in all cases there was much abbreviation; that rationalization resulted in changes in various types; and that the changes that are introduced may be radical." [22]

In a refinement of Bartlett's experiment, Allport and Postman [23] found that this verbal distortion is caused by three basic processes:

i. "Leveling", [24] which eliminates details so that the account becomes easier to manage.

ii. "Sharpening", [25] which produces selective perception, retention, and reporting of a limited number of details. There is a concentration on a selected number of stimuli at the expense of other stimuli. A particular aspect of this phenomenon, called "closure", manifests itself in a tendency to make a report more meaningful by adding material that was not

perceived by the reporter.

iii. "Assimilation",[26] which is the process of referring to things as they are normally perceived and remembered despite the nature of the stimulus. In one experiment, for instance, where a Red Cross ambulance is depicted as carrying explosives, the reporter recalls it as carrying medical supplies. In the words of the authors: "where an actual perceptual fact is in conflict with expectation, expectation may prove a stronger determinant of perception and memory than the situation itself."[27]

From the above discussion, it is submitted that the following conclusions may be drawn:

1. Hearsay normally contains more inherent weaknesses or dangers than other evidence.

2. These dangers concern the peculiar vulnerability that hearsay has to honest or dishonest errors in transmission.

3. They therefore relate to the sincerity, memory and powers of perception of the witness and not the original declarant who uttered the statement.

4. Even if other non-hearsay evidence of extra-curial statements often contains similar dangers, a logical basis still exists for distinguishing between the two classes of evidence as regards admissibility.

5. This fact, furthermore, does not reduce the value of identifying these dangers as possible contributory reasons for excluding hearsay, even though the existence of these

dangers alone cannot justify such exclusion.

(C) All evidence presents certain dangers of unreliability. In the case of hearsay, however, the absence of the standard procedural safeguards renders these dangers peculiarly difficult to assess.

This argument is inextricably linked to category (D) below, and, as will become apparent in the course of the discussion, it is probably incorrect to separate them. For the purpose of analysis, however, each will receive individual consideration.

Morgan,[28] with his usual clarity and inscrutable logic, identifies the problem by comparing two situations:

Situation I : Assume the proponent wishes to prove X by way of witness W, who testifies before the trier of fact, T, that he saw, heard or otherwise perceived X. In order to accept W's evidence, T must make the following set of inferences, each of which depends on the one preceding it: (1) that W actually said what he seemed to have been saying; (2) that W intended thereby to express the same proposition that T would have intended if T had used the same words or sounds; (3) that W believed he had perceived X; (4) that this belief was due to an actual experience of W, and was not the result of a reconstruction or a flight of the imagination; and (5) that the sense impressions of W corresponded with the objective fact.

Situation II : Assume now that the proponent wishes to establish X by calling W who testifies as follows: "Declarant, D, told me that he had perceived X." In order

to accept X, the fact sought to be proved, the trier now has to conduct two separate enquiries:

(a) Did D tell W that he had perceived X?

(b) Did D actually perceive X?

In the first enquiry, T has to employ exactly the same mental process as he used in Situation I, but this enquiry yields a result no more dramatic than that D, in the presence of W, made a particular statement. For, as Morgan puts it, "[h]ere the personal experience of which Witness speaks is not the perception of X, but the auditory perceptions of words uttered by Declarant." [29] It is the second enquiry that the proponent relies on to establish the perception of X, and here various new factors are brought into play which complicate the issue:

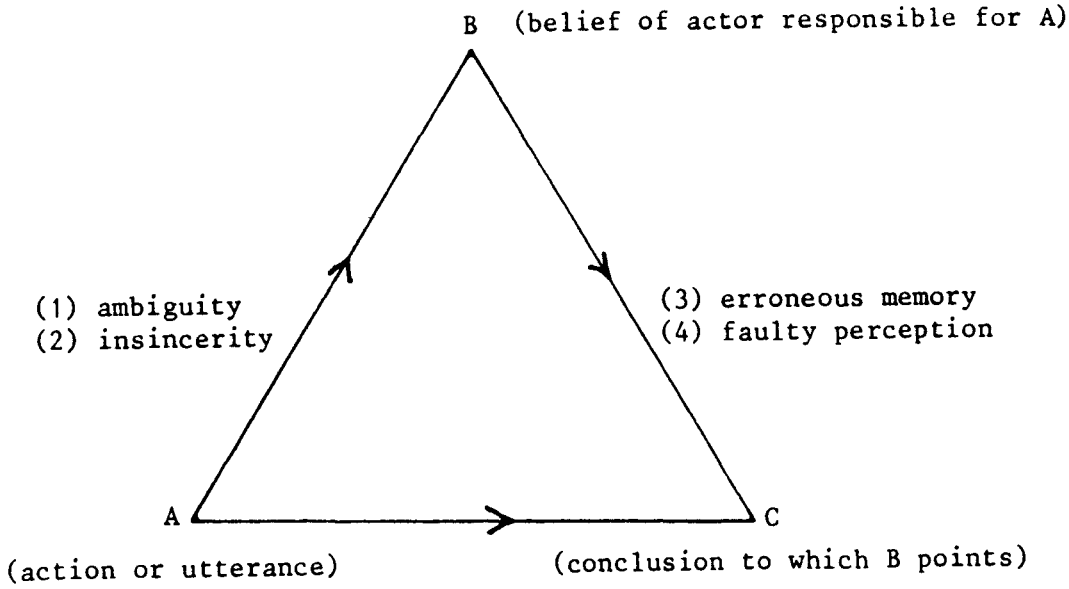
> "Declarant is not now speaking under oath, subject to a penalty for perjury, at a public hearing in the presence of Trier and subject to cross-examination by Adversary. Furthermore, none of these conditions existed at the time when Declarant made the utterance. Yet Proponent is asking Trier to rely upon Declarant's use of language, his sincerity, his memory, and his perception; and if Trier is to find that X occurred or existed, he must treat Declarant in all respects as in the former situation he treated Witness. In short, for this purpose Witness is merely the means of getting to Trier the statement of Declarant, and Declarant is the real witness upon the issue of the occurrence or existence of X." [30]

The reception of the evidence in Situation II would, therefore, according to Morgan, "render nugatory most of the regulations imposed on witnesses". [31] The questions concerning D's narrative ability, sincerity, memory and perception would, therefore, not be adequately answered, and the risks involved would not even be properly gauged, let alone re-

duced. It is these risks, which Morgan calls "hearsay dangers", that lie at the heart of the exclusion of hearsay evidence.

Professor Laurence H Tribe, in an article entitled "Triangulating Hearsay",[32] has devised an ingenious schematic model for identifying and analyzing these hearsay dangers. According to Professor Tribe, the basic hearsay problem is that of "forging a reliable chain of inferences, from an act or utterance of a person not subject to contemporaneous in-court cross-examination about that act or utterance, to an event that the act or utterance is supposed to reflect".[33] The first link in this chain is from the act itself to the belief it is supposed to express or indicate, a link which Tribe likens to a "trip" into the head of the declarant to see what he really thought about that act. The second link is from the belief of the declarant to a conclusion about an external event which either gave rise to that belief or is in some other way related to the belief. This involves a "trip" out of the head of the declarant, and necessitates a comparison between the declarant's belief and the objective reality sought to be proved.

Tribe depicts this series of inferences diagrammatically in the form of the following "testimonial triangle":[34]



This inferential chain is employed by the trier every time a witness gives evidence in court. However, if the act or utterance is not made in court, subject to the normal procedural requirements - as in Situation II discussed above - then the trustworthiness of the declarant's assertion becomes questionable. To investigate the dangers involved in accepting such an unchallenged act or utterance, Tribe considers each leg of the inferential chain separately:

(i) The trip from A to B : As has been shown, this involves a trip into the head of the declarant, and the question that must be asked is, "Did the declarant really entertain the belief he allegedly represents to have held?" In other words, if X is the fact sought to be proved, the question is, "Did D subjectively believe that he perceived X?" An affirmative answer to this question depends on two factors:

(1) Did D, by the words or actions that he employed, intend to convey the idea that he perceived X? The danger here is that, owing to poor narrative ability or a certain ambiguity in expression, W may understand from D's words or actions something other than what was intended by D.

(2) Was D sincere in representing his belief by those words or actions? If not, then the intra-curial report by W will, of course, be incorrect.

(ii) The trip from B to C : This trip raises the following question, "Did the declarant's belief in fact reflect accurately the external reality on which it is allegedly based?" This, in turn, depends on the following two additional factors:

(3) Was D's recollection of X sufficiently fresh to enable him to make a reliable observation?

(4) Were his powers of perception sufficiently competent to warrant placing reliance on his observation?

Either of these dangers may distort D's vision of reality and inspire a belief, which, although honestly entertained, does not correctly reflect the true facts.

Professor Tribe then demonstrates how his "Testimonial Triangle" may be used to identify the presence of a hearsay-type situation: If A is used to prove C by travelling through B, then, he submits, a traditional hearsay problem arises. It is only when A is used to prove C without the need for a detour through B, either explicit or implicit,

that no hearsay problem can be said to exist. To illustrate the point, he provides the following two examples: [35]

Example I : This illustration is based on the Amchitka nuclear test in 1971, [36] where the Chairman of the Atomic Energy Commission told reporters that he was taking his family to the site of the Amchitka blast in response to a challenge by a State Governor who was opposed to the blast. Suppose now that the issue were to arise as to whether sufficient safety precautions were taken for the nuclear test; could the conduct of the Chairman of the Commission be used in evidence to support the contention that the site was reasonably safe? Clearly, in order to travel from A (the conduct of the Chairman) to C (the fact that the site was safe), it is essential to consider the belief of the Chairman, thus necessitating a detour via B on the model. According to Tribe, the evidence is therefore hearsay, a conclusion that he submits is borne out by examining the dangers involved in receiving the evidence. It is quite possible, for instance, that the Chairman may have wished to dispel any fears and doubts that may have existed about the site's safety, and he may have accepted the challenge either without forming any opinion at all on the question or even despite a belief that the precautions taken were inadequate. Alternatively, although he may honestly have believed that the site was safe, he may have misread the situation or he may not have considered properly all the data at his disposal.

Both legs of the triangle therefore reveal dangers that

could be reduced, or at least properly identified and assessed, by means of cross-examining the Chairman in a court-room situation, where he would be under oath, where his demeanour could be observed under the critical eye of the trier and adversary, and where he would be obliged to present his testimony formally in the question-and-answer manner that characterizes the adversary system of trial procedure.

Example II : Assume that the issue before the court is whether D is capable of speech, and that W testifies that D said to him, "I can speak". Here the trip from A (the statement of D) to C (the conclusion that D can speak) may be made directly, without the need to consider D's belief as to whether he can speak or not. The conclusion is borne out by the very fact that D spoke to W, a fact which lies within the perception of W himself. The evidence is thus non-hearsay. If, however, the issue was whether D could read, and W had testified that D had told him "I can read", then clearly the trier would have to consider D's belief to that effect, and the evidence would be hearsay.

The model devised by Tribe is therefore a very useful analytical tool for identifying what Morgan calls the "hearsay dangers". It does not, however, purport to reflect the entire series of inferences that a trier has to draw in relying on a hearsay statement. This refinement of the model is effected by Lempert and Saltzburg,[37] who consider the following example: Assume that the accused, the owner of a red motor vehicle, is charged with knocking down and

killing victim V, and leaving the scene of the accident without reporting it to the authorities. Assume further that a witness, W, gives evidence that he arrived at the scene of the accident after the driver had fled, but that he heard declarant D state: "A red car hit V". In order for the trier to conclude from this evidence that a red car did in fact hit V, he must make the following set of inferences:

(i.) W's evidence that he heard D say "A red car hit V."

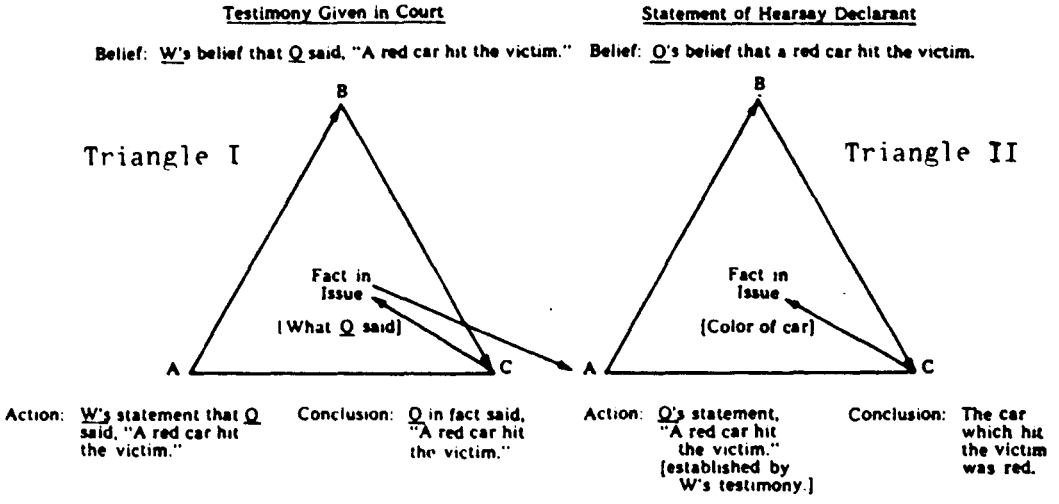
⇒ (ii.) W believes that D made this statement.

⇒ (iii.) D did make this statement.

⇒ (iv.) D believed that a red car hit V.

⇒ (v.) A red car did hit V.

These inferences, the learned authors submit, may be resolved into the following two distinct testimonial triangles:[38]



Each of these triangles concerns a different issue: whereas Triangle I is concerned with whether D made the statement, "A red car hit V", the issue in Triangle II is whether a red car did in fact hit V. These two questions correspond exactly with the two-stage enquiry identified by Morgan in Situation II above, and, in conjunction with what was said there, the following observations may be made:

a. The determination of the issue in Triangle I is greatly facilitated by the fact that it lies within the perception of W, who is subject to the standard procedural devices demanded by the Adversary System of trial procedure.

b. The nature of the evidence that W gives, however, contains certain intrinsic dangers. W is recounting a hearsay statement, and, as has been observed above, such statements are peculiarly vulnerable to errors in transmission.

c. These errors may be either fraudulent (encountered in the trip from A to B in Triangle I) or honest (encountered in the trip from B to C in that triangle).

d. Triangle I, therefore, illustrates those dangers that are inherent in hearsay evidence and which have already been discussed in (B) above.[39]

e. In Triangle II, the determination of the issue is rendered more difficult by the fact that it lies within the perception of someone who is <u>not</u> subject to the standard procedural requirements, viz. D.

f. The dangers presented by all evidence, therefore, concerning the sincerity, narrative ability and powers of memory and perception of the attesting party, which are normally satisfactorily assessed by means of those procedural devices, remain unmeasured.

g. Triangle II, therefore, illustrates those dangers which, although not peculiar to hearsay evidence, are rendered more difficult to ascertain and assess in such evidence because of the absence of procedural aids. It is these dangers that have constituted the focal point of the enquiry in (C).

h. It may happen that in a particular item of evidence these dangers may be satisfactorily assessed and accounted for by various circumstantial indications of trustworthiness, despite the fact that the declarant is not subject to the oath, cross-examination etc. Yet such evidence is usually excluded.

i. It would appear, therefore, that the absence of these procedural norms constitutes the main reason for the exclusion of hearsay evidence. To test the validity of this conclusion, it is necessary to examine these requirements more closely.

D. The absence of those standard procedural devices that characterize the Adversary System

It has been said that "[o]ne of the psychological assumptions implicit in the law of evidence is that all human testimony in its natural state is too untrustworthy to be

considered by a jury unless its narration be conditioned in a manner calculated so as to improve it in trustworthiness as to avoid the danger of the jury's being deceived into an erroneous verdict." [40]

Of these conditional devices, the oath and cross-examination have traditionally enjoyed the greatest prominence. Today it is fashionable to explain the hearsay rule entirely in terms of the latter requirement. [41] Wigmore, for instance, expressed the view that "the essence of the Hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination, and that the judicial expressions ... coupling oath and cross-examination had in mind the oath as merely the ordinary accompaniment of testimony given on the stand, subject to the test of cross-examination." [42] Cross states that "[t]he absence of an opportunity to cross-examine the maker of the statement is ... the best all-embracing reason that can be given for the rule", [43] and Morgan makes the following observation:

> "[S]o great is the emphasis upon cross-examination in modern decisions that it seems reasonable to assert that the principal ground for rejecting hearsay is an idea basic to our entire system of litigation : the adversary has a right that the trier shall not be influenced by testimony which the adversary has had no opportunity to cross-examine." [44]

The point has been made by some writers, however, most notably Strahorn and Schiff, that this view unjustifiably ignores the "other conditioning devices which, in co-operation with cross-examination, seek to improve the trustworthiness of normally unreliable human narration". [45] It is

convenient, therefore, to examine individually the views of these two writers in order to identify and evaluate these devices.

I. STRAHORN : Strahorn lists what he calls the "conditioning devices" as follows: [46]

Group 1 : Those devices which purport to improve the trustworthiness of human testimony by presenting the stimulus of fear in the witness. This fear may be either that of divine punishment (the oath), of human punishment (the penalty for perjury), or of public disapproval incidental to the witness's being contradicted either by himself or by others (in the form of discovery, publicity, confrontation and cross-examination.)

Group 2 : The device of normal testimonial narration in the presence of the trier of fact, a device that "presents to the witness the stimulus of fear of the power and dignity of the tribunal and also leads to more accurate acquisition of meaning by the latter because of the advantage of the fact finder's being able to observe the demeanour and tone of voice of the witness as he narrates". [47] This requirement, the learned author remarks, affords certain other devices which are also available to improve the trustworthiness of human testimony, such as the process of refreshing memory and the use of aids such as maps, diagrams, photographs and interpreters, all of which concern the memory, perception and narrative abilities of the witness and tend to remove from his testimony some of its

native untrustiworthiness.

The hearsay rule, Strahorn submits, is essentially a function of two variables:

i. the requirements of the conditioning devices and

ii. the testimonial elements of perception, recollection and narration. The basic objection to a hearsay statement is therefore that "it was not made under the beneficent influence of the conditioning devices calculated to make human testimony sufficiently accurate". [48]

But apart from this, there is, he adds, another factor that further shows the untrustworthiness of hearsay, viz. the reception of such evidence generally entails running twice the normal risk of defect in the testimonial process. The reason for this is that, although the witness relating the hearsay statement is subject to the conditioning devices, there is still no guarantee of the trustworthiness of his testimony. The conditioning devices merely aid the court in measuring the deficiencies of human testimony; they do not ensure its reliability.

In the light of these observations, Strahorn prefers the view that it is the absence of all the conditioning devices and the benefits of normal testimonial narration that makes hearsay objectionable, and not merely the absence of cross-examination. He believes it is helpful to consider hearsay evidence as "human testimony in the raw, unfit to be used for narrative purposes unless it has been exposed to all the processes set up for all raw human testimony and without

which none may be considered".[49] The hearsay rule, therefore, he submits, is "nothing more than a detailed application of the several requirements for the improvement of all human testimony".[50]

II. SCHIFF : In an article entitled "Hearsay and the Hearsay Rule : A functional View",[51] Schiff also rejects the conventional wisdom that hearsay is objectionable merely because the declarant was not under oath and not subject to cross-examination when he made the statement in question. This traditional statement of the rationale of the hearsay rule, he submits, is far from the whole story. In order to appreciate the true picture, it is necessary to examine carefully the demands which the adversary trial system puts on a person who testifies. Such witness is subject to at least eight procedural constraints, all of which, Schiff says, "the law puts on him with the condition that if any one is not satisfied, his testimony about the relevant matter will not be heard":[52]

(1) A pre-trial interview with one or both counsel, in order to ascertain what he personally knows relevant to the dispute, and at which witness statements are taken.

(2) Just before the trial, a last-minute review of evidence, during which counsel refreshes the witness's responsible memory, takes him through a mock examination-in-chief and cross-examination, explains the necessity of speaking the truth, considerations of relevancy, personal knowledge and the operation of

the exclusionary rules.

(3) Trial in open court, with testimony given in the presence of judge, trier of fact, parties, their counsel, and spectators.

(4) The swearing of an oath or taking of an affirmation prior to giving evidence.

(5) The witness must be shown to have perceived or have had an opportunity to perceive the relevant matter relating to the subject-matter of his testimony.

(6) He must also be shown to have had the capacity at the time to perceive the matter accurately, "capacity spanning the instant of perception and the instant of testimony to remember accurately what he then perceived and capacity as he testifies verbally to communicate that memory to the trier of fact".[53]

(7) He must speak in response to questions put to him during examination-in-chief, guiding both the format and content of what he says.

(8) He may then be cross-examined by the adversary, in which case he must again respond to questions, which are designed for any one or more of a number of purposes:[54] (a) to show that he had no opportunity to perceive; or (b) to show that he did not have the ability to understand what he perceived; or (c) to show that he did not in fact perceive it accurately; or (d) that his memory has faded between then and now; or (e) to show that he deliberately did not reflect his memory in his examination-in-chief; or (f) to show that there has not been accurate verbal com-

> munication of his memory to the trier of fact, because his use of language is different from what the trier has understood from his evidence-in-chief; or (g) to cause the witness to withdraw or at least alter an assertion made in his examination-in-chief; or (h) to elicit from the witness new matter not touched on in chief but which is helpful to the opponent's case or harmful to the case of the calling party.

In the case of the hearsay declarant, in Schiff's view, none of these procedural demands is satisfied, whereas all these requirements must be satisfied when a witness gives oral testimony. Functionally, therefore, Schiff concludes, the hearsay rule "bars evidence of words offered to prove the matter they assert when none of the standard demands imposed upon testimonial evidence has been satisfied".[55] These demands, as he points out, go far beyond the traditionally cited procedures concerning the oath and the opportunity to cross-examine. Furthermore, he argues, when the focus is on the opportunity to cross-examine, it must "be understood in the light of the potential results of its skilful use",[56] keeping in mind the possible uses to which it may be put as discussed above.

Both Strahorn and Schiff, therefore, are in accord in rejecting the absence of cross-examination as the only factor that warrants an objection to the reception of hearsay. They both require human testimony, before it may be admitted, to be subjected to a whole series of procedural devices of

which cross-examination constitutes only one - albeit particularly important - of the components. Where the two writers diverge, however, is in their perspectives of the aims and purposes of these devices. For Strahorn, the purpose of the conditioning devices is to improve the trustworthiness of the evidence so as to avoid misleading the trier of fact and to prevent the trier from being deceived into an erroneous verdict. Schiff, however, follows a different point of view, claiming that the procedural demands of the adversary system are imposed largely in the interests of the adversary, and not the trier. He states:

> "In sum, the hearsay rule functions almost not at all to protect the triers of fact from making erroneous findings. It functions mainly to protect the opposing party against evidence of relevant matters presented in a fashion not satisfying the well-settled demands of witness examination in our trial system. In this light, the rule makes good sense in the context of a system with those demands." [57]

Schiff's view in this regard is more in line with the modern conception of the hearsay rule as a device for protecting the adversary. In the words of Professor Morgan, "while the earlier emphasis appears to have been upon guarding Trier from being misled either by an honest, credulous witness or one seeking to deceive, the present doctrine stresses protection not of Trier but of Adversary". [58]

In the United States, in criminal trials, the basic values underlying the hearsay rule have become inextricably linked with the constitutional limitations of the Sixth Amendment's Confrontation Clause, which was held to be applicable to the States by virtue of the Fourteenth Amendment in the case

of Pointer v Texas.[59] This clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... ". The United States Supreme Court has held that the "hearsay rules and the Confrontation Clause are generally designed to protect similar values",[60] and "stem from the same roots",[61] but, since 1965, it has grappled to come to terms with the difficult task of reconciling and determining the relationship between the two rules. In a series of cases,[62] the Court has attempted to formulate an approach that would satisfactorily accommodate the interests of both, but, until the recent decision in Ohio v Roberts,[63] no integrated theory had emerged.

In the seminal decision in Roberts, however, Justice Blackmun, writing for a six member majority, conducted a thorough analysis of this problem, an analysis that sheds valuable light on the rôle and rationale of the hearsay rule. The Confrontation Clause, said the learned judge, "reflects a preference for face-to-face confrontation at trial",[64] in which is envisioned

> "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[65]

These procedural devices for testing the accuracy of testimony, he added, are "so important that the absence of proper confrontation at trial 'calls into question the ulti-

mate integrity of the fact-finding process'".[66] On the other hand, the Supreme Court has recognized that "competing interests" may in certain cases warrant dispensing with confrontation at trial on the grounds of public policy and necessity. This tension between competing interests has been resolved by recourse to the dual principles of necessity and reliability. In order to dispense with the requirement of confrontation, therefore, the prosecution must satisfy the court that:

(i) the declarant, whose statement it wishes to use against the defendant, is unavailable (unless the utility of trial confrontation is so small that the production of an available witness is deemed unnecessary : Dutton v Evans[67]); and

(ii) the hearsay evidence of the absent declarant is "marked with such trustworthiness that 'there is no material departure from the reason of the general rule'".[68]

The latter requirement was clearly explained in Mancusi v Stubbs,[69] where the court stated:

> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant', Dutton v Evans [400 U.S. 74 (1970) at 89] ... and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement', California v Green [399 U.S. 149 (1976) at 161]. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability'." [70]

What are these "indicia of reliability"? In the words of Justice Blackmun:

> "The Court has applied this ... requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" [71]

The learned judge commented on the close association between the Confrontation Clause and the hearsay rule, and concluded as follows:

> "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." [72]

The majority of the court then applied these principles to the facts in Roberts's case, which were as follows: The defendant was charged with forgery. At the preliminary hearing, the defence called the daughter of the victim of the forgery as a witness. At the trial itself, the prosecution, after unsuccessful attempts to secure her testimony, produced the transcript of her testimony at the preliminary hearing in rebuttal of the defendant's own testimony. The court held that the admission of this transcript did not violate the Confrontation Clause because (1.) the record disclosed that the witness was constitutionally unavailable for purposes of the trial, and (2.)

the witness's prior testimony "bore sufficient indicia of reliability and afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement." [73] This was so despite the fact that defence counsel's initial questioning of the witness occurred on direct examination as opposed to cross-examination, because:

> "Counsel's questioning clearly partook of cross-examination as a matter of form. His presentation was replete with leading questions, the principal tool and hallmark of cross-examination. In addition, counsel's questioning comported with the principal purpose of cross-examination: to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.' Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions : A Functional Analysis, 85 Harv LRev 1378 (1972)." [74]

This treatment of the Confrontation Clause by the United States Supreme Court is in harmony with the views of Strahorn and Schiff concerning the rationale of the hearsay rule, to which the Confrontation Clause is so closely related. It is submitted, moreover, that this approach provides a useful pointer to resolving the hearsay problem in countries that do not have a Confrontation Clause, such as South Africa, because, by identifying the values that underlie the principle of confrontation, a better understanding of the theoretical foundation of the hearsay rule is possible. The reason for this is that every hearsay question automatically involves a consideration of the problem presented by absence of confrontation

(although the converse is not true), and the Confrontation Clause was added to the United States Constitution to prevent the abuses that were possible under the common law hearsay rule.[75]

To illustrate this proposition, let us consider again Morgan's example[76] in which the proponent wishes to establish X by calling a witness, W, who testifies that "D told me that he had perceived X." This is clearly a hearsay statement, transmitted to the trier in such a way that the adversary has no opportunity to confront the declarant, D. With reference to the analysis presented by Justice Blackmun in Roberts, what factors must be considered by a court in weighing up the merits and demerits of this evidence?

A. Factors militating against admissibility:

a. Prejudice to the adversary, owing to the absence of confrontation and all its attendant benefits in the form of the standard procedural devices enumerated by Schiff above.

b. Prejudice to the integrity of the fact-finding process, owing to the absence of testimonial narration as a means of allowing the trier of fact to evaluate more accurately the evidence at his disposal, as explained by Strahorn above.

B. Factors promoting admissibility:

a. Factors mitigating the prejudice to the adversary: The adversary only suffers prejudice if the absence

of the procedural devices is detrimental to his case. A finding, therefore, that either (i) these devices would not have enjoyed any substantial utility on the facts of the case, or (ii) adequate substitutes exist in that particular case for the unavailable procedures (as in Roberts above), would remove the sting from this objection.

b. Factors mitigating the prejudice to the trier and the integrity of the fact-finding process:

A finding that either (i) the evidence contained adequate "indicia of reliability" to merit reliance thereon by the trier of fact, or (ii) that any prejudice caused to the integrity of the fact-finding process was outweighed by considerations of public policy operating in favour of reception of the evidence - such as the need for the evidence, unavailability of the declarant to be called as a witness and the probative value of the evidence - would provide a cogent basis for admissibility.

It is immediately apparent that these factors, apart from their utility in resolving a Constitutional confrontation issue, also lie at the very heart of the hearsay problem. It is submitted, moreover, that the absence of confrontation constitutes the major objection to the admissibility of hearsay, and that, in countries such as South Africa, where the issues of hearsay and confronta-

tion have not been separated, and where the right of confrontation (at least in criminal trials) has not been constitutionally ensured, any attempt to reform hearsay law would be greatly enhanced by assimilating the product of the American courts' experience in grappling with this vital issue.

By way of illustration, it is interesting and illuminating to look at the decision of the Fourth Circuit Court of Appeals in United States v Payne.[77] The four petitioners had been convicted by the court a quo of conspiracy for obtaining, possessing and passing counterfeit Federal Reserve Notes. Four other co-defendants, including one Burrell, had pleaded guilty to the same charges. Before pleading, Burrell had been interviewed by a Secret Service Agent, one Donald. During the interview, he made a statement to Donald in which he confessed his own guilt and also implicated the petitioners. However, the interview was terminated before Burrell signed the statement, as he claimed to be suffering from dizziness and lack of memory. At Burrell's arraignment, Donald gave evidence concerning the confession made to him, although the statement itself was not admitted. Donald made no mention of the reference to the petitioners in the statement. In the court a quo, Burrell was called to testify as a government witness against the petitioners, but, when questioned, he claimed to be unable to recall either pleading guilty, talking with Secret Service agents, or any scheme to counterfeit notes. Donald then gave evidence as to the substance of Burrell's statement, and, despite the objection of the defence

counsel, the statement itself was admitted in evidence.

On appeal, it was contended that the statement and the evidence given by Donald should have been excluded on two grounds, viz. that it infringed the rule against hearsay, and that it fell foul of the Confrontation Clause, in that Burrell had not made his statement in court, and the petitioners were denied an opportunity to confront him on account of his loss of memory. In a divided decision, however, the court held the evidence to have been properly received.

Judge Winter, delivering the judgment for the majority, considered first the hearsay objection, and seemed to take the view that the evidence could be admitted by way of the exception concerning "recorded past recollection". [78] However, he went on to say, it was unnecessary to decide on the applicability of this exception, as the evidence was admissible on another ground: It is established United States law that prior inconsistent statements of a witness available for cross-examination may be received as affirmative proof when they were made at a former trial or before a grand jury. [79] The rationale of this rule, he added, is that "the fact of an oath or possible cross-examination provide sufficient assurances of reliability that the statement ought to be admitted as substantive evidence of the fact it contains". [80] This principle, the majority found, was equally applicable to Burrell's statement in the present case, as "his statement was sufficiently tested as to reliability that it, too, ought to

be held admissible to prove the truth of its contents, even though technically it had not been sworn to, or he cross-examined".[81]

These indications of reliability, according to the learned judge, were furnished inter alia by Burrell's silence during his arraignment at which Donald had testified about the contents of the statement. Although Burrell, admittedly, had not been specifically asked if he controverted the results of his interview, he added, there could be no question

> "that Burrell's attention was directed to his statement, that he had ample opportunity to disavow the fact of the interview and what was discussed, or to assert his lack of recollection of all or any part of it, and that his silence, in the presence of the court, amounted to tacit admissions that the interview took place, that he remembered it and that he acknowledged the correctness of Mr Donald's testimony of his answers."[82]

In conclusion, the majority opined that the reliability of the statement had been sufficiently established "that admission of the record into evidence was not barred by mechanical application of the rule against hearsay testimony".[83]

The Confrontation Clause, too, the majority found, was no insuperable barrier to admissibility. Relying on the principle enunciated in California v Green that "the Confrontation Clause ... reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial",[84] Judge Winter found that there was no denial of the right of

confrontation in the present case. He conceded, however, that Burrell's alleged loss of memory reduced the efficacy of cross-examination substantially, in that inquiry into the evidence of guilt on the part of the petitioners would now be excluded, but added that "this was no different, except in degree, from a case in which a declarant has made a detailed earlier statement and at the trial, despite efforts to refresh his recollection, remembers only some, but not all, of the details". [85]

Moreover, the learned judge added, Burrell was available for cross-examination on other matters, such as possible bias or prejudice towards his brothers, whether any pressure had been applied by his brothers to encourage his loss of memory etc. He added:

> "The jury would thus have had a substantial basis on which to determine the truthfulness of Burrell's previous statement and full opportunity to observe Burrell's demeanour and manner of testifying so that it could make a determination of whether there was a genuine failure of recollection and its significance on the persuasiveness of his earlier statement." [86]

Accordingly, the apparent loss of memory had not made "a critical difference" in the application of the rights of confrontation, and no basis existed for excluding the evidence on that ground.

In his dissent, however, Judge Widener disagreed on both the hearsay and confrontation issues. In his view, the evidence did not qualify under any recognized hearsay exception, and, moreover, had "few, if any, attributes of reliability". [87] He based his latter contention largely

on the fact that Burrell had never been subjected to oath or cross-examination on the statement, that the part of the statement implicating the petitioners had never been brought into issue at Burrell's arraignment, and that the statement itself, on its face value, was incomplete, unsigned and highly suspect owing to Burrell's lapses of memory and dizziness.

On the issue of confrontation, he found that Burrell's failure to repeat his incriminating statements at trial constituted a violation of this right, as the petitioners were unable to avail themselves of effective cross-examination in the sense that it is understood in true adversary trial procedure.

In a thorough analysis of the issues raised in Payne, Worthington [88] criticizes the reasoning of the majority on the following grounds:

(1) As opposed to the traditional view adopted by Judge Widener, the majority eschewed dogma in a more flexible approach to the hearsay problem. In so doing, it tacitly approved a doctrine of judicial discretion to admit evidence when its potential unreliability is outweighed by the probative value of the evidence. The problem, according to Worthington, is not so much this "progressive approach", which finds substantial judicial support in the United States, [89] but rather "the court's failure to temper its relaxation of the hearsay rule with any objective standard of trustworthiness beyond 'sufficient reliability'." [90] Thus "the weakness in Judge Winter's opinion is

the failure to establish any formula to justify his conclusion of 'sufficient reliability'", [91] and the court accordingly "seems to have conferred upon the trial judge limitless discretion to admit evidence when he feels that the cumulative impact of the circumstances attests to its reliability". [92]

(2) Even if the "progressive approach", as set out in general terms by the majority in Payne, is accepted, the decision of the court to allow the evidence was incorrect. The value of Burrell's statement as substantive evidence was slight, containing only minor references to the petitioners. Judge Winter's "constructive oath and cross-examination", moreover, are subjected to the following criticism:

> "Primarily, although Burrell had the opportunity to challenge Agent Donald's testimony, the agent was reciting only what Burrell had told him. Thus, only the accuracy of Donald's transcription was tested. Burrell, who made the statement, was never subjected to cross-examination on the facts contained in the statement. Next, the nature of the proceeding - a guilty plea arraignment - cast doubt upon the existence of any adversary process which would insure reliability of the statement. Finally, the absence of any reference to statements inculpating the defendant, the fact that Burrell did not testify at his arraignment, and the lack of any meaningful cross-examination at the present trial certainly cast doubts upon any resemblance to the criteria of former testimony." [93]

(3) As regards the confrontation issue, Worthington again prefers the dissenting view of Judge Widener, on the ground that the Confrontation Clause requires not only the

formality of an opportunity to cross-examine, but also the reiteration at trial by the witness of his accusations against the defendant. This, he argues, is more in line with the nature of adversary proceedings and the values underlying the principle of confrontation.

It is respectfully submitted that Worthington's criticism of the majority decision is valid. While the progressive approach of allowing a judicial officer a discretion to admit hearsay when the normal objections to its reception are disposed of is to be welcomed, it is nevertheless submitted that some parameters or guidelines are necessary to temper the judicial discretion. A proper consideration should, therefore, include an assessment of all the factors identified above as being crucial to the enquiry, including the utility of the inoperative procedural devices, the adequacy of the substitute safeguards, the circumstantial 'indicia of trustworthiness', the need for the evidence and its probative value. If these factors had been properly considered in Payne's case, it would have been evident that Burrell's silence at his arraignment during Donald's testimony was no proper substitute for the oath, cross-examination and the other procedural standards; that the utility of a proper cross-examination of Burrell would have been substantial; that the statement, in Judge Widener's words, had "few, if any, attributes of reliability"; that the need for the evidence was slight as the prosecution had introduced other, more substantial evidence inculpating the petitioners; [94] and that the evidence en-

joyed little probative value owing to the inconclusive references to the petitioners' guilt.[95]

CONCLUSION TO SECTION A

If there is one aspect of the hearsay rule on which most writers are ad idem, then it is its unsatisfactory state in most jurisdictions, including our own, and the dire need for reform. We have, at least in South Africa, a rigid exclusionary rule with a number of tightly-structured exceptions, which has created a situation where "[i]n Pavlovian fashion any evidence falling under a recognized exception (is) admitted, regardless of its reliability, while sufficiently reliable evidence not falling under a traditional exception (is) excluded".[96] The direction that the reform should take is, however, a matter that has caused much academic debate. Judge Weinstein,[97] for instance, lists six possible approaches which could possibly be adopted as alternatives to the status quo:

(i) Exclude all hearsay.

(ii) Admit all hearsay.

(iii) Liberalize and codify present rules.

(iv) A general principle rule, in terms of which a judicial officer is given a general discretion to admit hearsay in respect of which there exists a sound basis for admissibility (such as adequate indications of trustworthiness).

(v) A selective application of different principles to different types of cases, a criterion which in-

volves differential treatment of civil and criminal proceedings.

(vi) Retain the present rules and ignore them, a practice that, it is respectfully submitted, describes what happens in the practice of our courts on frequent occasions.[98]

No matter which of these paths our legislature in due time follows, however, it is certain that no satisfactory solution will be arrived at unless the principal values underlying hearsay theory are properly identified, evaluated and applied. The dangers of ignoring these values are vividly demonstrated by the decision of the Fourth Circuit Court of Appeals in Payne, where the court followed the current American trend of allowing the admission of hearsay evidence in the absence of a recognized exception on the basis of "sufficient reliability", and in the process admitted evidence which flagrantly violated all the values on which the hearsay rule is based.

What then, in sum, are the values that the hearsay rule serves to protect? It operates to exclude, as a general rule, evidence of an extra-curial assertion, which is tendered for a purpose that would require the court to treat the out-of-court actor or declarant as a witness, because such evidence is not subjected to the standard procedural devices that the adversary system of trial procedure considers necessary and equitable in the interests of both the adversary and the integrity of the fact-finding process.

The question that remains to be considered in Section B, is whether the protection of these values, in the form of a general exclusionary rule, is justifiable.

SECTION B : IS THE EXCLUSION OF HEARSAY JUSTIFIABLE?

(I) The Exclusion of All Hearsay

"If, then, hearsay is not as satisfactory as other kinds of evidence, why not ... exclude all hearsay?" [99] The reason, according to Judge Weinstein, is that "[e]xcluding all hearsay would substantially decrease the probability of our achieving truth in the courtroom ... increase the cost of litigation and lead to worsened calendar congestion by requiring the calling of innumerable witnesses". [100] No lawyer, he adds, can seriously support this approach, as it would "deny to the trier much useful information which should be available if he is to have a substantial chance of coming to a correct conclusion on the facts". [101]

Clearly the analysis of the reasons for excluding hearsay in Section A is not a rational basis for excluding all hearsay. The practice of the courts, furthermore, is against such an all-embracing exclusion, and, according to Judge Weinstein, [102] the hearsay rule is applied strictly in only one per cent of United States civil litigations. In effect, he adds, "[i]n the sea of admitted hearsay, the rule excluding hearsay is a small and lonely island" which is "being constantly eroded by steadily rising waves of exceptions and growing breezes of oversight". [103] Moreover, in the words of Prof. Morgan,

"[t]here never has been a time when the courts of England or America rejected all hearsay evidence; and there once was a time when hearsay was received without question".[104]

II. The Exclusion of Any Hearsay

In its present form, the hearsay rule operates to exclude all hearsay that does not fit within the tightly structured and rigidly defined common law or statutory exceptions. Is this residual exclusion of hearsay justifiable? Should the courts be deprived of evidence that may carry a strong degree of probative force merely because such evidence is hearsay?

In a recently published article in the Harvard Law Review entitled "The Theoretical Foundation of the Hearsay Rules",[105] the view is expressed that the hearsay rule should be abolished, as the reasons traditionally advanced for its existence are incapable of rationalizing the exclusion of any relevant hearsay evidence. Although this argument focuses on jury trial procedure, it is nevertheless of some assistance in non-jury systems as a model for determining when, if at all, the exclusion of hearsay evidence is justifiable.

At the heart of this model lie two basic assumptions : (i) that a primary goal of our legal system is to achieve accurate case results, and (ii) that the reason for excluding relevant hearsay evidence is that the trier of fact - in this model referred to as the jury - will erroneously overassess the value of that evidence. Because of the

absence of cross-examination, the argument goes, the jury may be inclined to give the evidence an inflated value in excess of that value which an expert would give it, which is referred to as its "absolute value". The cost of admitting such evidence is therefore the difference between the two values, which is referred to as the "residual gap". If assumption (i) is borne in mind, the exclusion of this evidence is only justified if the cost of receiving it exceeds its testimonial value, i e if the residual gap exceeds the value of the evidence. Expressed mathematically, a prerequisite for exclusion is that:

Jury perception - Absolute Value > Value.

For most practical purposes, however, it is argued, "absolute value" and "value" will be equal. Thus, for exclusion, it is required that

Jury perception - Value > Value

or : Jury perception > 2 Value.

Therefore, it is argued, hearsay evidence should only be excluded, when the value that the trier of fact places on the evidence exceeds twice its true value. This event is, however, unlikely, as "it requires the existence of factors that indicate to the experts in the legal profession that the credibility of some evidence is very low but that are so far beyond the comprehension of laypersons that juries still would assess the credibility as being quite high".[106] Therefore the hearsay rule should be abolished.

This argument, it is submitted, contains the following central weaknesses:

(a) The premiss that hearsay is excluded because the trier of fact is liable to overassess its value is an over-simplification of the reasons considered in Section A. It emphasizes the prejudice caused to the trier and the integrity of the fact-finding process without considering the prejudice caused to the adversary. No account is therefore taken of the incalculable damage to the adversary's case caused by denying him the right of confrontation and the concomitant procedural aids to which he would ordinarily be entitled in bolstering his own case and attacking that of his opponent.

(b) The equating of the absolute value and the true probative value of an item of hearsay evidence is unjustifiable. The primary objection to the reception of hearsay is that, owing to the absence of the procedural safeguards, its true value is peculiarly difficult to assess from the point of view of the trier, and the fact that the trier is an expert instead of a jury will not completely remedy this problem. This does not, however, necessarily mean that it has a low true value; it may in fact be highly reliable evidence with a high probative force, from an objective point of view. To equate these two concepts is, therefore, to pre-judge the issue and to ignore a vital portion of the cost of receiving hearsay, viz. the fact that even an expert cannot assess accurately its true value.

(c) Because of the difficulty of assessing the true value of hearsay, the formula laid down as a criterion for exclusion - viz. that the value placed on it by the trier must exceed twice its true value - is of no practical value. To argue that this requirement will seldom be satisfied is also not very helpful, because in each <u>specific</u> instance the court will be unable to assess the true value of an item of hearsay evidence.

(d) A serious defect in the cost-benefit model, moreover, is that it compares the total benefit of receiving hearsay evidence against, not the <u>total</u> cost involved, but that part of the cost that is attributable to the hearsay quality of the evidence, i e the marginal cost or the increase in cost caused by the fact that the evidence is not original, but hearsay. This exercise, restricted thus in its ambit, must therefore not be allowed to enjoy exaggerated impact; it merely yields a conclusion that the hearsay cost <u>alone</u> - defined as the increase in total cost attributable to the fact that the evidence is hearsay instead of original - is normally insufficient to justify excluding hearsay evidence. This, however, takes no account of the other costs incurred in receiving the evidence. All evidence, whether hearsay or not, is admitted at a cost. This cost is normally assessed when the court considers the relevance of the evidence. At this point, the court compares two variables :

(i) The probative value of the evidence - its ability to persuade reasonable men of the truth of

the fact it is tendered to establish.

(ii) The disadvantages or inconvenience caused by receiving it, in the form of collateral side-issues, confusion, surprise, unwarranted consumption of court time etc.

The evidence will only be considered sufficiently relevant, i e "legally relevant",[107] if its probative value exceeds the disadvantages raised by its reception. Assume, for instance, that, on a scale from 0 to 100, the probative value of an item of evidence is 60, and that the disadvantages it creates may be expressed empirically as equivalent to 40 units; the evidence will be considered legally relevant, and, all else being equal, admissible. Suppose, however, that the evidence is, in addition, hearsay, and that the hearsay cost measures a further 25 units. This increases the <u>total</u> cost to a reading of 65 units, which exceeds the total benefit of receiving the evidence (i e its true probative value) by 5 units. A strong argument may now be made for excluding it.

The point that emerges from this argument is that the hearsay cost, while itself not normally sufficient to warrant the exclusion of hearsay evidence, may be a decisive component in determining the total cost of admitting such evidence, and, therefore, in deciding a question of admissibility.

Despite this criticism, it is submitted that some helpful points emerge from this argument :

(i) The question of whether to exclude an item of hearsay

evidence should be resolved by weighing up the cost and the benefit of receiving such evidence.

(ii) As the writer of the article points out, in assessing the cost of admitting the evidence, "[m]ost investigations look to the reliability of hearsay in a vacuum instead of focusing upon the reliability gap".[108] The cost of admitting the evidence, for instance, is greater where the evidence is fairly reliable, yet the trier still significantly overassesses its credibility, than where it is unreliable, but all its defects are obvious to the trier. The traditional approach of admitting reliable hearsay and excluding unreliable hearsay would, however, admit the former and exclude the latter, even though the cost of receiving the evidence is greater in the former instance.

(iii) Arguments on the question of admissibility often consider only the cost of admitting hearsay and ignore the other side of the scale, viz. the benefits derived thereby. To exclude an item of relevant evidence that is hearsay, the cost of receiving the evidence must exceed its probative value; to ignore this "value lost" when evidence is excluded is to forget that hearsay often carries considerable force,[109] which Weinstein defines as "its power to convince a dispassionate trier of fact that a material proposition ... is true or false",[110] or "the increment, resulting from admission of evidence, in the degree of belief which it is rational to entertain".[111]

Keeping in mind all the above considerations, it is submitted

that a modified model may be devised to determine when the exclusion of hearsay may be justified. I concede readily that the value of such a mathematical model may be limited, but the current trend towards scientific analysis[112] cannot be completely ignored, and, having had a mathematical background myself, I find it difficult to resist entering the fray. It would be wise, however, to keep in mind the caveat of Prof. Laurence Tribe:

> "In an era when the power but not the wisdom of science is increasingly taken for granted, there has been a rapidly growing interest in the conjunction of mathematics and the trial process. The literature of legal praise for the progeny of such a wedding has been little short of lyrical. Surely the time has come for someone to suggest that the union would be more dangerous than fruitful."[113]

Without losing sight of these dangers, I nevertheless feel that a mathematical exposition of the theoretical foundations of hearsay could be beneficial, in that it would help to simplify many complex and nebulous concepts by representing them empirically as concrete values. As the subject of our model, let us consider again Morgan's example,[114] cited above, where the proponent wishes to establish X by calling W, who testifies that D told him that he had perceived X. Assume that the value of evidence, as well as factors enhancing or negating its value, may be quantitatively reflected on a scale calibrated between 0 and 100. For the purposes of this model, four separate readings on this scale are relevant:

(1) That value which the court will give it, in the knowledge that it is dealing with hearsay, after caution-

ing itself as to the relevant dangers involved in relying on the evidence, and after examining the various circumstantial safeguards that may be present to mitigate those dangers. Let us call this value V.

(2) That value which the same court would have given the evidence if D had come to testify himself in open court, subject to the various procedural safeguards available to the trier and adversary. Call this value R.

(3) The true, objective value of the evidence in proving the existence of X, a value that will not necessarily coincide with R, because the procedural safeguards are not guarantees that the true value of an item of evidence will emerge. In the words of Prof. Morgan, "if a witness is prepared to commit perjury and counsel is willing to co-operate, neither oath nor cross-examination will be of much avail to expose the willful falsehood unless either witness or counsel is unusually stupid".[115] Let us call this true value Q.

(4) The non-hearsay disadvantages - such as surprise, confusion, raising of side-issues etc - considered by the court in assessing the legal relevance of the evidence. Let us refer to this "non-hearsay cost" as N. The empirical value of N will, for the purposes of this model, be taken as being smaller than Q, otherwise the evidence will not be sufficiently relevant to warrant its reception, and the hearsay question will not even need to be considered.

As has been submitted above, the exclusion of an item of rele-

vant hearsay evidence (or, in fact, any other evidence) may only be justified if, from an objective viewpoint, the total cost of receiving it were to exceed the total benefit caused thereby.

(A) Total benefit : This is reflected simply by its true value, viz. Q. If the evidence were excluded, therefore, the court would be losing evidence having an objective evidential value of Q.

(B) Total cost : This is the aggregate of three separate cost functions:

a.) Non-hearsay cost : This, as has been demonstrated, is reflected empirically by the reading N, a value which is taken as being smaller than Q for the purposes of this model.

b.) Hearsay cost : This cost represents the difference between the value that the court gives the evidence, V, and the value it would have given it if it were not hearsay, R. The hearsay cost is, therefore, V - R. It would be erroneous to consider the hearsay cost to be the difference between V and Q (the true value of the evidence), as this includes a non-hearsay cost (R - Q) which reflects the error which a court makes in assessing non-hearsay evidence. This is caused by the fact that the standard procedural devices, although they are the most effective means at a court's disposal for ascertaining the true value of evidence, do not ensure absolutely correct results. The function R - Q, therefore, represents a built-in cost attributable to the imperfections of our trial system, and must be considered a third component of total cost.

c.) The built-in cost, caused by the imperfections of the standard procedural devices, R - Q.

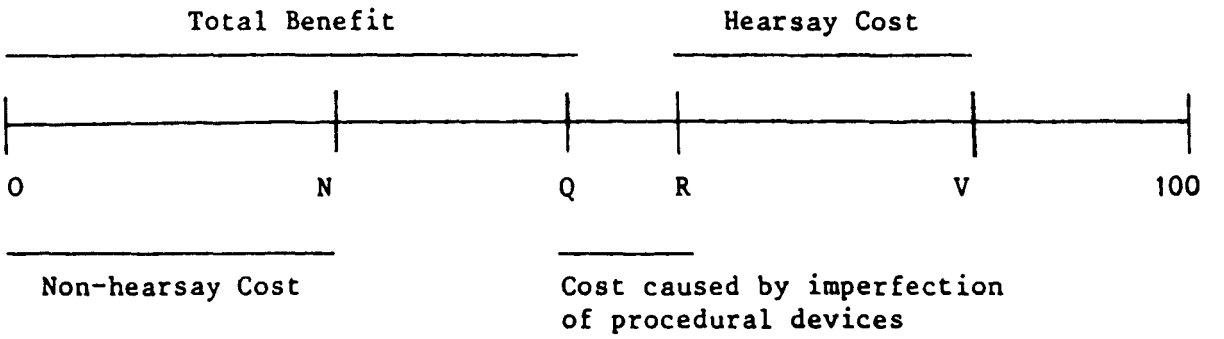
The total cost of admitting hearsay evidence, therefore, is the sum of these three components, or N + (V - R) + (R - Q). To justify its exclusion, this total cost must exceed the total benefit derived by its reception, i e Q.

∴ N + V - R + R - Q must exceed Q.

i e N + V must exceed 2Q.

In other words, the exclusion of hearsay evidence is only cost-efficient if the sum of its non-hearsay cost and the value placed on it by the court were to exceed twice its true value.

This model may be expressed diagrammatically as follows :



Out of this analysis, two separate questions may be considered :

Question 1 : How often will the hearsay cost alone justify the exclusion of hearsay evidence?

It will only do so when the hearsay cost, V - R, exceeds

the value, Q, of the evidence, i e if $V - R > Q$

or $V > Q + R$

or $V > 2Q + a$, where a = the cost caused by the imperfections of the procedural aids. This means that the value which the court places on hearsay must exceed more than twice its true value before it may properly be excluded. Clearly this will very seldom be the case, as it is highly unlikely that a court will be misled into such a gross misperception of the value of an item of hearsay evidence. Brysh [116], in an appeal for the abolition of the hearsay rule, maintains that any overassessment there may be of the value of hearsay evidence - a proposition that he considers, in any event, to be questionable - is mitigated by certain aids that are available to the trier of fact in evaluating it :

(1) Comment upon the value of the evidence by opposing counsel, in which is pointed out "the general unreliability of certain types of second-hand information and the specific unreliability of particular statements offered at trial". [117]

(2) Circumstantial evidence relating to the credibility of hearsay declarants. The adversary could lead evidence to impeach the declarant's credibility by, for instance, showing that he is generally untrustworthy, that he had a motive to lie in this specific case, or that he was not in a position to observe properly the events contained in his statement.

(3) The cross-examination of the witness who is relating the hearsay statement. This aid is usually underestimated, as cross-examination of W may often elicit much useful infor-

mation concerning the reliability of the statement, or, at the very least, raise the necessary questions concerning the dangers latent in the evidence, which may thus be brought to the attention of the trier of fact. To illustrate the point, Brysh gives the following example of a cross-examination of a witness whose evidence contains hearsay :

> "Counsel: Ms. Andrews, you testified that Mr. Lane told you that he saw the defendant shoot the victim. Is that correct?
>
> Witness: Yes, it is.
>
> Counsel: Ms. Andrews, how long have you known Mr. Lane?
>
> Witness: I'm not exactly sure, but at least two years.
>
> Counsel: How well have you known him?
>
> Witness: Not very well. He's lived on the same street as I have for a couple of years. I've had brief conversations with him a few times. Mostly we just say hello to one another on the street.
>
> Counsel: What would you estimate to be the length of the longest conversation with Mr. Lane you've ever had?
>
> Witness: Oh, ten or fifteen minutes.
>
> Counsel: Ms. Andrews, are you aware of Mr. Lane's reputation in the community for truthfulness?
>
> Witness: I don't think I've ever heard anything one way or the other about that.
>
> Counsel: So you are not aware that Mr. Lane has any reputation for truthfulness?
>
> Witness: I guess not.
>
> Counsel: Has Mr. Lane ever told you anything you later found to be false or inaccurate?
>
> Witness: No.
>
> Counsel: Are you aware of any difficulties Mr. Lane may have in seeing?
>
> Witness: Well, he generally wears glasses. Beyond that, I don't know.
>
> Counsel: Did he tell you whether he was wearing his glasses when he observed the shooting?
>
> Witness: No.
>
> Counsel: How well does he see without his glasses?
>
> Witness: I don't know.

Counsel: Did Mr. Lane tell you where he was wh he allegedly saw the defendant shoot the victim?

Witness: Yes, in the parking lot of Jay's Supe Market where the shooting occurred.

Counsel: Did he say how far he was standing from the shooting?

Witness: No.

Counsel: That's a rather large parking lot, isn't it?

Witness: I would estimate that it is several hundred feet square.

Counsel: So at the time Mr. Lane could have been standing several hundred feet from the person firing the gun?

Witness: I really don't know.

Counsel: It is possible, isn't it?

Witness: I suppose it's possible.

Counsel: Are you aware of any motive Mr. Lane may have had for lying about what he said?

Witness: I don't understand what you mean.

Counsel: Is there any reason why Mr. Lane might have lied to you concerning the shooting?

Witness: Not that I know of.

Counsel: Thank you, Ms. Andrews." [118]

As the learned author points out, although the hearsay statement has not been discredited entirely - an event which would not occur very often - counsel has at least raised the necessary questions concerning the reliability of the statement which the trier of fact should be asking himself:

> "The first four questions test the witness's knowledge of the declarant as a basis for the witness's evaluation of the declarant's credibility. The fifth and sixth questions test the declarant's credibility by means of his reputation. The seventh question tests the declarant's credibility by means of the personal knowledge of the witness. The eighth through fifteenth questions test the

> declarant's perception by means of his eyesight and position at the time of the event. The final two questions test the declarant's possible motives for lying." [119]

In the light of these factors, Brysh concludes, it is unlikely that the trier of fact will be misled by the admission of hearsay. This does not imply, as Brysh would have it, that the exclusion of any hearsay is not justifiable. It merely means that the hearsay cost alone, being the increase in total cost attributable to the fact that the evidence is hearsay instead of original, will very seldom justify the exclusion of an item of hearsay evidence. To argue, as Brysh does, that this is a valid ground for abolishing the hearsay rule, would be to ignore the fact that the reception of evidence that is hearsay may involve incurring <u>other</u> costs, which, together with the hearsay cost, may indeed warrant the exclusion of the evidence.

<u>Question 2 : How often will the exclusion of hearsay evidence be cost-efficient and thus justifiable</u>?

It will only be warranted when the total cost exceeds the total benefit of receiving it, or, as has been demonstrated, when $N + V > 2Q$.

i e $V > 2Q - N$.

i e $V - Q > Q - N$.

This means that the exclusion of hearsay evidence is only justifiable if the actual over-assessment of the evidence by the court $(V - Q)$ exceeds its "nett probative value" $(Q - N)$, or the difference between its probative value and the non-hearsay cost of its reception.

What is the likelihood of this requirement being satisfied? It is convenient to consider separately the possible over-assessment of hearsay evidence in jury and non-jury proceedings respectively.

I. Jury Trials : The capacity of a jury for properly assessing the value of hearsay has been the subject of much academic debate : Nokes,[120] for instance, states that "[t]here can be little doubt that a lawyer experienced in litigation is more likely than a jury to arrive at a just estimate of the cogency of hearsay", while the basic assumption underlying Wigmore's entire treatment of hearsay is a "judicial conviction that the jury must be protected from testimony which it cannot evaluate",[121] in that "the jury is likely to overvalue it by failing to distinguish it from testimony given in open court under oath and subject to cross-examination".[122]

James,[123] however, finds this contention to be "highly questionable", arguing that "this comparative evaluation of hearsay as against direct evidence is one of the things all persons do in their common concerns".[124] He adds: "The weakness of rumor, the possibility of error in repetition and the likelihood that persons subjected to no effective check will lie in their own interests are matters of common observation", and the assessment of such material "is in no sense peculiarly a judicial technique".[125] Brysh,[126] too, submits "that modern jurors are capable of recognizing the inherent unreliability of hearsay", arguing that "all people make decisions on the basis of such hearsay as what others tell

them, what they read in newspapers, and what they see and hear by means of television and radio", and they thereby "come to distinguish instinctively between that hearsay which comes from reliable sources and that which does not".

II. Non-Jury Trials : The opposition to retaining the hearsay rule in non-jury trials is far more vociferous and persuasive. Davis,[127] in a helpful article on this question, wrote that the "exclusion of relevant and reliable hearsay rests heavily on the jury system and may make little or no sense in a nonjury case, especially when the hearsay happens to be the best evidence obtainable on a question of fact that must be answered".[128] He cites the views of the following writers in support of his contention:[129] Thayer, who referred to the law of evidence as "a piece of illogical but by no means irrational patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system"[130]; Wigmore, who said that "any attempt to apply strictly the jury-trial rules of Evidence to an administrative tribunal acting without a jury is a historical anomaly, predestined to probable futility and failure"[131]; and McCormick, who stated: "As rules they are absurdly inappropriate to any tribunal or proceeding where there is no jury".[132]

In jury trials, Davis argues, where hearsay may be prejudicial, a ruling must be made as to its admissibility. In non-jury cases, however, where the judge is equally exposed to the hearsay whether he admits it or excludes it, he submits that admission without a ruling "does no harm and may

be more economical than making a ruling".[133] This approach, he adds, is reflected in the practice of the federal courts in the United States, where "the most significant question about hearsay in nonjury cases accordingly is not admissibility but evaluation".[134]

A strong statement of this view, Davis continues, is to be found in the decision of the Eighth Circuit Court in Builders Steel Co v Commissioner,[135] where the court expressed the following opinion:

> "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. ... We think that experience has demonstrated that in a trial or hearing where no jury is present, more time is ordinarily lost in listening to arguments as to the admissibility of evidence and in considering offers of proof than would be consumed in taking the evidence proffered, and that, even if the trier of facts, by making close rulings upon the admissibility of evidence, does save himself some time, that saving will be more than offset by the time consumed by the reviewing court in considering the propriety of his rulings and by the consequent delay in the final determination of the controversy."[136]

The main direction of the federal case law, he concludes, is "toward the view that in nonjury trials a finding may be based on 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs,'[137] whether or not the evidence is technically admissible as hearsay".[138] This criterion is enthusiastically endorsed by Levin and Cohen,[139] who tender the following comment on this approach:

> "Candid recognition of a rule allowing such hearsay to be admissible in the nonjury criminal case would be a substantial advance. Certainly it would contribute to simplicity and efficiency in the trial process, obviating the need for the judge constantly to be concerned with the latest

> version of the exceptions and their technicalities. It would not do so at the expense of reliability and trustworthiness, but rather by means of making these the tests and pursuing directly that which has always been viewed as the ultimate goal."[140]

The inexorable inference that flows from these views is that the rule which excludes hearsay should be abolished, at least in non-jury trial procedure, and that the hearsay question should be one which concerns the issue of weight instead of admissibility. Thus, evidence that is considered excessively prejudicial or particularly difficult to assess because of the hearsay dangers it presents, may be received but considered as having very little or even no weight. This view has considerable merit, and would certainly serve to simplify and remedy many of the anomalies of the status quo. Nevertheless, at least in South Africa, it would be unlikely to enjoy enthusiastic acclaim for the following reasons:

1. It would constitute too radical a departure from the traditional perspective of the hearsay problem, which has always concerned the question of admissibility before the assessment of the weight of the evidence. Even in the United States, where the treatment of the hearsay question has been far more liberal, neither the courts nor the legislature have espoused so fundamental a deviation from the traditional practice.[141]

2. The exclusion of some hearsay is always justifiable, even if the hearsay objection is the only cost factor considered (viz. when $V - R > Q$). The amount of hearsay evidence that warrants exclusion, furthermore, is

greatly increased when the role of hearsay as a marginal cost, or additional cost factor, is considered (i e when $V - Q > Q - N$). To consider this evidence as being admissible, but as carrying zero weight, would not be cost-efficient, as this would entail the inconvenience and consumption of time caused by hearing the evidence and all the side-issues concerning credibility which would arise from its reception. The optimum cost-efficient procedure would, therefore, be to exclude the evidence entirely from consideration.

3. American academic appeals for the abolition of the exclusionary rule should be treated with caution, as they are tendered against the background of the United States constitutional provisions which safeguard the accused's right to confrontation in criminal proceedings. As Levin and Cohen point out,[142] the adoption of such steps in the United States would not obviate the need for compliance with this requirement, as "the Supreme Court has given ample notice that no redefinition of hearsay doctrine will be permitted to subvert that right".[143] In South Africa, however, there are no such constitutional or statutory safeguards in criminal trials, and it has fallen to the lot of the hearsay rule to preserve the accused's right of confrontation. The abolition of the hearsay rule would, therefore, entail a loss which could not adequately be reflected or measured in terms of the above analysis, and would strike at the very core of the values that our accusatorial process guards so jealously.

Conclusion to Section B

The question that remained to be considered at the end of Section A was whether the preservation of the values which the hearsay rule served to protect warranted the existence of an exclusionary rule in one or other form. In answer to this question, the following contentions are submitted:

(a) The exclusion of all hearsay is unjustifiable.

(b) The reception of all hearsay, thus relegating the hearsay problem to a consideration of weight evaluation only, instead of admissibility, is not altogether desirable and does not achieve optimum cost minimization.

(c) The most satisfactory solution would thus be the exclusion of some hearsay and the reception of the rest - subject always to an assessment of its weight - on the basis of some criterion that takes into account those values which lie at the heart of adversary trial procedure.

(d) The consensus of opinion is that the existing system of an exclusionary rule with rigidly-defined exceptions is unsatisfactory, and an unscientific method of separating admissible from inadmissible hearsay.[144] In the words of Tregarthen,[145] the present rules "more often serve to hinder than to promote justice", and "the distinction in probative value between statements admissible under the particular exceptions and statements that are not admissible is of the flimsiest description".[146]

(e) What satisfactory criterion may, therefore, be employed to resolve the problem? This question must await later attention, after the scope of the hearsay rule, and, particularly the meaning of hearsay and the question of implied hearsay assertions, have been considered. It will later be submitted that the only rational solution is to allow the court a discretion to admit hearsay whenever the values of the adversary system would not be promoted by excluding it.[147]

(f) Is the argument for the abolition of the hearsay rule stronger in the case of non-jury trials than jury trials? This depends on what view is taken of the historical role of the hearsay rule: if, as Thayer[148] and Wigmore[149] argue, the rule is the child of the jury system, then a cogent argument can be made for such a distinction; if, however, as Morgan would have it, the rule is the product of the adversary system, then no such dichotomy is possible, as the values guarded by that system are threatened equally by the abolition of the hearsay rule in either type of trial.

(g) The important point that emerges from the discussion in this chapter is, therefore, in the words of Prof. Stanley Schiff, that the exclusion of some hearsay "makes good sense in its place within that body of legal doctrine governing the working of the adversary trial system".[150] As a corollary to this proposition, however, he adds the following qualification - that the judicial officer be allowed a discretion to

"admit any item of hearsay evidence at a trial when the purposes of the hearsay rule within our litigation system would be served no more than barely under the particular circumstances".[151]

NOTES TO CHAPTER III

1 Baker The Hearsay Rule (1950) at 18-24.

2 Id at 18.

3 Ibid.

4 (1837) 7 Ad & El 313 at 385.

5 Phipson on Evidence 13ed (1982) 16-07 at 333.

6 Op cit note 1 at 20.

7 1958 (3) 285 (A) at 296.

8 Op cit note 1 at 19.

9 See, for instance, R v Bedfordshire (1855) 4 El & Bl 535 at 541 and The Berkeley Peerage Case (1811) 4 Camp. 415.

10 L H Hoffmann and D T Zeffertt The South African Law of Evidence 3ed (1981) at 18.

11 In Omega v African Textile Distributors 1982 (1) SA 951 (T) at 955; see also Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763 (CA).

12 7 Cranch. 295.

13 10 Pet. 412 at 436.

14 9 Cush. 40.

15 Wigmore Evidence V 3ed (1940) para 1363.

16 Op cit note 1 at 20.

17 Id at 18.

18 C T Mc Cormick Handbook of the Law of Evidence 2ed (1972) at 582-3; see further Gardner "The Perception and Memory of Witnesses" (1933) 18 Cornell LQ 391.

19 R O Lempert and S A Saltzburg A Modern Approach to Evidence (1977) at 336-7.

20 F C Bartlett Remembering: A Study in Experimental and Social Psychology, Cambridge University Press (1932); paperback edition (1967). For a discussion of similar such experiments, see Research Paper 3 of the Australian Law Reform Commission (1981) at 14-39.

21 Id at 175.

22 I Daniel Stewart Jr "Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence" (1970) Utah LR 1 at 20.

23 G Allport and L Postman The Psychology of Rumour (1947).

24 Id at 80-1.

25 Id at 86.

26 Id at 100.

27 Id at 104.

28 Edmund M Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harvard LR 177 at 177-9.

29 Id at 178.

30 Id at 179.

31 Ibid.

32 Laurence H Tribe "Triangulating Hearsay" (1974) 87 Harvard LR 957.

33 Id at 958.

34 Id at 959.

35 Id at 959-61.

36 A report of this incident may be found in the Boston Globe Nov 5 1971 at 16.

37 Op cit note 19 at 336.

38 Ibid.

39 See p 20 ante.

40 John S Strahorn Jr "A Reconsideration of the Hearsay Rule and Admissions" (1937) 85 University of Pennsylvania LR 484.

41 See Strahorn, op cit note 40 at 500 and especially note 22.

42 Wigmore Evidence V 3ed (1940) para 1362.

43 Sir Rupert Cross Evidence 5ed (1979) 479.

44 Edmund M Morgan "The Hearsay Rule" (1937) 12 Washington LR 1 at 3-4.

45 Strahorn op cit 40 at 500.

46 Id at 484-8.

47 Id at 484.

48 Id at 486.

49 Id at 500.

50 Ibid.

51 Stanley Schiff "Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Canadian Bar Review 674.

52 Id at 679.

53 Id at 678.

54 Id at 678-9.

55 Id at 679.

56 Ibid.

57 Id at 681.

58 Morgan "Hearsay Dangers ... " op cit note 28 at 184.

59 380 U.S. 400 (1965).

60 See California v Green 399 U.S. 149 (1976) at 155.

61 See Dutton v Evans 400 U.S. 74 (1970) at 86.

62 These cases include Douglas v Alabama 380 U.S. 415 (1965); Barber v Page 390 U.S. 719 (1968); United States v Bruton 391 U.S. 123 (1968); California v Green 399 U.S. 149 (1976); Dutton v Evans 400 U.S. 74 (1970); Mancusi v Stubbs 408 U.S. 204 (1972); Chambers v Mississippi 410 U.S. 284 (1973); and Davis v Alaska 415 U.S. 208 (1974).

For academic commentary on the topic, see generally Thomas A. Mauet "Prior Identifications in Criminal Cases: Hearsay and Confrontation Issues" (1982) 24 Arizona LR 29; Peter Westen "Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases" (1978) 91 Harvard LR 567 and "The Future of Confrontation" (1979) 77 Michigan LR 1185; Kenneth Graham "The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One" (1972) 8 Crim. L. Bull. 99; "The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness" (1978) 56 Texas LR 151; Baker "The Right to Confrontation, the Hearsay Rules, and Due Process, A Proposal for Determining When Hearsay May Be Used in Criminal Trials" (1974) 6 Connecticut LR 529; and William Worthington "Hearsay and Confrontation: Can the Criminal Defendant's Rights be Preserved under a Bifurcated Standard?" (1975) 32 Washington & Lee LR 243.

63 448 U.S. 56 (1980).

64 Id at 63.

65 Mattox v United States 156 U.S. 242 (1895) at 242-3, cited in Roberts (supra note 63) at 64.

66 Ohio v Roberts 448 U.S. 56 (1980) at 64, quoting from Chambers v Mississippi 410 U.S. 284 (1973) at 295.

67 400 U.S. 74 (1970).

68 Ohio v Roberts 448 U.S. 56 (1980) at 65, quoting from Snyder v Massachusetts 291 U.S. 97 (1934).

69 408 U.S. 204 (1972).

70 Id at 213.

71 Ohio v Roberts 448 U.S. 56 (1980) at 66, quoting from Mattox v United States 156 U.S. 242 (1895) at 244.

72 Id at 66.

73 Id at 73.

74 Id at 70-1.

75 See United States v Payne 492 F. 2d 449 (1974) at 459.

76 See p 28 ante.

77 492 F. 2d 449 (1974).

78 Id at 451.

79 See United States v Mingoia 424 F. 2d 710 (1970) and United States v Insana 423 F. 2d 1165 (1970).

80 United States v Payne 492 F. 2d 449 (1974) at 451-2.

81 Id at 452.

82 Ibid.

83 Ibid.

84 399 U.S. 149 (1976) at 174.

85 United States v Payne 492 F. 2d 449 (1974) at 454.

86 Ibid.

87 Id at 455.

88 William Worthington "Hearsay and Confrontation: Can the Criminal Defendant's Rights be Preserved under a Bifurcated Standard?" (1975) 32 Washington & Lee LR 243.

89 Examples of cases where this "progressive approach" finds support are: Dallas County v Commercial Union Assurance Co 286 F. 2d 388 (1961); Gelhaar v State 163 N.W. 2d 609 (1969); Jett v Commonwealth 436 S.W. 2d 788 (1969); United States v Mingoia 424 F. 2d 710 (1970); United States v Insana 423 F. 2d 1165 (1970); United States v De Sisto 329 F. 2d 929 (1964); and People v Green 479 P. 2d 998 (1971). See further pp 385 to 389 post.

90 Worthington, op cit note 88, at 256.

91 Id at 258.

92 Ibid.

93 Id at 254, note 57.

94 See United States v Payne 429 F. 2d 449 (1974) at 452.

95 The relevant portions of Burrell's statement implicating the petitioners are reproduced in Worthington's article, op cit note 88, at 245 note 12.

96 Worthington, op cit note 88, at 257.

97 Jack B Weinstein "Alternatives to the Present Hearsay Rules" 44 F.R.D. 375.

98 See particularly the discussion of implied hearsay assertions in Chapter V, VI and VII post.

99 Weinstein, op cit note 97, at 375.

100 Ibid.

101 Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 336.

102 Weinstein "Alternatives ... " op cit note 97, at 347.

103 Id at 346.

104 Edmund M Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harvard LR 177 at 179.

105 (1980) 93 Harvard LR 1786.

106 Id at 1790.

107 See L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) at 18.

108 (1980) 93 Harvard LR 1786 at 1796.

109 See Jack B Weinstein "Probative Force of Hearsay", note 101 supra.

110 Id at 331.

111 Id at 331-2.

112 See, for example, Laurence H Tribe "Trial by Mathematics: Precision and Ritual in the Legal Process" (1971) 84 Harvard LR 1329 and the references cited therein, and Glanville Williams "The Mathematics of Proof" [1979] Crim LR 297 and 340.

113 Tribe, op cit note 112, at 1393.

114 Morgan "Hearsay Dangers ... ", op cit note 104, at 177-9. See p 28 ante.

115 Morgan, op cit note 104, at 186.

116 Paul J Brysh "Abolish the Rule Against Hearsay" (1974) 35 University of Pittsburg LR 609.

117 Id at 625.

118 Id at 625-6.

119 Id at 626-7, note 111.

120 G D Nokes "The English Jury and the Law of Evidence" (1956) 31 Tulane LJ 153.

121 Edmund M Morgan and John MacArthur Maguire "Looking Backward and Forward at Evidence" (1937) 50 Harvard LR 909 at 919.

122 Ibid.

123 George F James "The Role of Hearsay in a Rational Scheme of Evidence" (1940) 34 Illinois LR 788.

124 Id at 794.

125 Ibid.

126 Brysh, op cit note 116, at 624.

127 Kenneth Culp Davis "Hearsay in Nonjury Cases" (1970) 83 Harvard LR 1362.

128 Id at 1365.

129 Id at 1365-6.

130 James Bradley Thayer A Preliminary Treatise on Evidence at the Common Law (1898) 509.

131 Wigmore Evidence I 3ed (1940) para 4b.

132 C T Mc Cormick Evidence in 5 Encyclopedia of Social Sciences 637 (1931), at 644.

133 Davis, op cit note 127, at 1366.

134 Id at 1368.

135 179 F. 2d 377 (1950).

136 179 F. 2d 377 (1950) at 379. See also Joseph A Bass Co v United States 340 F. 2d 842 (1965) at 845, and United States v United Shoe Machinery Corp 89 F. Supp. 349 (1950).

137 In the words of Judge Learned Hand in NLRB v Remington Rand 94 F. 2d 862 (1938) at 873.

138 Davis, op cit note 127, at 1368.

139 A Leo Levin and Harold K Cohen "The Exclusionary Rules in Nonjury Criminal Cases" (1971) 119 University of Pennsylvania LR 905.

140 Id at 928-9.

141 See Brysh, op cit note 116, at 616-21 for a concise discussion of the treatment of hearsay in the Model Code of Evidence, the Uniform Rules of Evidence and the Federal Rules of Evidence.

142 Levin and Cohen, op cit note 139, at 929.

143 Ibid.

144 See Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 345-6 for an analysis of some of the major criticisms of the status quo.

145 Tregarthen Hearsay Evidence (1915) 138.

146 Id at 140.

147 See Chapter X post.

148 Thayer op cit note 130.

149 Wigmore op cit note 131.

150 Stanley Schiff "Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Canadian Bar Review 674 at 674.

151 Ibid.

Chapter IV

THE SCOPE OF THE HEARSAY RULE : THE MEANING OF HEARSAY

In the previous chapter, an attempt was made to investigate why the rule against hearsay arose to become one of the corner-stones of the Anglo-American system of evidence. I considered the rationale of the hearsay rule, but I did not attempt to lay down a comprehensive definition of hearsay, or to formulate the so-called rule against hearsay, being content rather to indicate the general nature and function of the hearsay rule. My reason for this approach is simple, and will become increasingly evident in the course of this chapter - 'hearsay' is one of the most elusive concepts in the law of evidence, that seems to defy all attempts to confine it within definable limits, and that remains tantalizingly out of reach of all attempts to establish its scope and ambit.

Why, one may well ask, has a rule which no less an authority than Wigmore has called "the greatest and most distinctive contribution of Anglo-American law (next after jury trial) to trial procedure", [1] and which has exercised a formidable influence on the rules of trial procedure for over three centuries, continued to exist in such a nebulous state?

Why, as Cross asks [2], is there such a "superstitious awe ... about having any truck with evidence which involves A's telling the court what B said"? How did this bastion of Anglo-American procedural law congeal into a "conglomeration of conflicting considerations modified by historical accident", [3] or a "tissue of doctrine that seems to function best when it is most transparent - that is, when it is essentially ignored" [4] ?

According to Phipson [5], the reasons for the misunderstandings

surrounding the meaning of hearsay and the scope of the hearsay rule are three-fold:

(1) A general failure to appreciate that any attempt to define the meaning and scope of hearsay must encompass an examination of the purpose for which a statement is tendered, not only its nature.

(2) The absence of any comprehensive judicial formulation of the rule.

(3) The multiplicity of formulations found in text books upon the subject.

The first reason advanced by the learned author may seem self-evident, but is nevertheless essential to any attempt to formulate a satisfactory definition of hearsay : If W testifies that X told him that he (X) had seen Y shoot Z, it is tempting to classify W's evidence immediately as hearsay without any further consideration, but this would be quite wrong without an examination of the purpose for which W's evidence is tendered. If it is tendered to establish that Y did indeed shoot Z, then it is clearly hearsay, no matter which definition of hearsay we care to choose. But if the evidence is tendered to prove that X was capable of speech, then equally clearly, the evidence cannot be considered hearsay. The point may seem trite, but it is worth bearing in mind throughout any study of the hearsay rule.

The second reason is echoed in a statement by Lord Reid in Myers v DPP [6], where the learned judge reflected the frustration and cynicism which surrounds this topic in the following words:

> "It is difficult to make any general statement about the law of hearsay which is entirely accurate."

This frank acknowledgement by his lordship of this difficulty points, it is submitted, to why the courts have been so reluctant to provide a comprehensive definition of hearsay. It explains why the hearsay rule has been allowed to become a principle which the courts in practice apply on innumerable occasions despite the fact that its limits are shadowy, slippery and ill-defined.

The definitions which have been preferred by the courts have tended to be rather tentative, and have certainly not been entirely satisfactory. In Subramaniam v Public Prosecutor [7], the following definition was tendered:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what it contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

Much the same approach is adopted by the South African courts, e g in Estate De Wet v De Wet [8], Watermeyer J defined hearsay as

> "evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement."

The learned judge later elaborated a little on this formulation in the case R v Miller, [9] where he formulated the following principle:

> "Statements made by non-witnesses ... [i] f they are tendered for their testimonial value (i e as evidence of the truth of what they assert) ... are hearsay and are excluded because their truth depends upon the credit of the asserter which can be tested only by his appearance in the witness-box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible ...".

In Canada, the USA and Australia, a similar trend has been followed by the courts, namely ad hoc commentaries on whether the evidence in question in each case falls within the scope of the hearsay rule, without attempting a comprehensive definition of what hearsay actually is. The tentative definitions which have been offered are frequently unhelpful, and do not always square with known results.

In the absence of clear judicial assistance, it has been left to academic opinion to establish a comprehensive definition of hearsay and to investigate its constraints. However, so plentiful and so contradictory are these definitions, that, as Maguire was moved to observe,[10] we have become entangled in an "unintelligible thicket". To illustrate the density of this thicket, let us consider a few of these definitions:

(1) Cross[11] defines hearsay as "a statement other than one made by a person while giving oral evidence in the proceedings."

(2) Phipson[12] states the rule as follows: "Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them, unless they were made by a party or in certain circumstances the agent of a party to those proceedings and constitute admissions of facts relevant to those proceedings." This definition is a departure from the view expressed in earlier editions of Phipson[13], where hearsay was defined as "oral or written statements made by persons who are not parties and who are not

called as witnesses ... (used) to prove the truth of the matters stated."

(3) Stephen[14] : "A statement oral or written made otherwise than by a witness in giving evidence and a statement contained or recorded in any book, document or record whatever ... are deemed to be irrelevant for the purpose of proving the truth of the matter stated."

(4) Mc Cormick[15] : "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein and thus resting for its value upon the credibility of the out-of-court asserter."

(5) Jones[16] : "By 'hearsay' is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness has received his information."

(6) Tribe[17] defines hearsay by making use of his model which was examined in the previous chapter, the so-called 'hearsay triangle'. According to this definition, a "traditional hearsay problem exists ... when 'A' is used to prove 'C' along the path through 'B'," or, put another way, an assertion is hearsay if, in order to reach the conclusion for which it is tendered, reliance has to be made on the belief of an actor who is not the witness testifying before the court.

(7) Lempert and Saltzburg[18] make use of the same model to derive their definition of hearsay : "An out-of-court

> statement is hearsay if and only if the inference which the proponent seeks to establish depends upon affirmative answers to both right and left leg questions." These questions to which the learned authors refer are the enquiries which accompany the mental 'trip' from A to B (the left leg) and from B to C (the right leg) of the hearsay triangle, namely "Does the declarant believe the fact for the proof of which the assertion has been tendered?" and "Does this belief accord with the reality of the situation?"

Many other definitions have, of course, been provided, but it would serve little purpose to list any more, as those already referred to are among the most commonly employed. Moreover, the point will already have been proved, namely that the profusion of different definitions has done little to solve the confusion surrounding the meaning of hearsay.

To illustrate the irreconcilability of these definitions, three examples will be considered:

Example 1 : W testifies that X told him "I am alive" in order to establish that X was in fact alive at the time.

Clearly, in terms of the definitions adopted by Stephen, Phipson (all editions) and Mc Cormick, the statement will be considered hearsay and hence excluded, as it is being tendered to prove the truth of its contents. However, using the definitions of Jones, Tribe and Lempert and Saltzburg, the statement is equally clearly NOT hearsay, as, to use Jones' terminology, the evidence derives its value solely from the credit of the

witness himself; or, to use our triangle analogy, the trip from A (the statement of X to the effect that he was alive) to C (the fact that he was alive) does not necessitate passing through B (the belief of X that he was in fact alive), as the conclusion flows directly from the act itself.

Example 2 : W testifies that in response to a question put to X as to whether he had been at the scene of the crime, X had nodded affirmatively. This is an example of assertive conduct, and although generally considered hearsay, this conclusion is not borne out by all the definitions above. For example, Stephen, Phipson and Mc Cormick all define hearsay as 'statements', which would not seem to include evidence of conduct; Stephen even goes as far as restricting the rule to "oral or written statements". Cross on the other hand defines 'statements' to include "assertions by conduct", while the definitions of Jones, Tribe and Lempert and Saltzburg by their very nature necessarily include assertive conduct.

Example 3 : W testifies that he saw X, the captain of a ship, undertake a thorough investigation of his ship, after which he embarked on a voyage with his wife and children. The evidence is tendered to establish that X considered his vessel to be seaworthy. This is an implied assertion, which will be the focus of much closer attention in the following chapters, and which illustrates the full extent of the dilemma relating to the bounds of the hearsay rule. The first problem is that there are two types of implied assertions, viz statements which are offered, not for what they expressly assert, but what they impliedly assert, and physical conduct tendered for the same purpose. As we saw, most of the definitions are unhelpful even

when dealing with assertive conduct; in the case of non-assertive conduct (and indeed statements), these definitions are in most cases entirely valueless. What merit is there in asking whether a 'statement' is being tendered to prove the truth of its content when it is in fact not being tendered to establish its content at all? Implied assertions are tendered to establish something which is implied from the content of the statement, or physical act, something which the actor did not intend to convey at all. Accordingly, definitions such as those of Phipson, Stephen and Mc Cormick are not comprehensive enough even to come to grips with the problem of implied assertions, let alone provide a solution. On the other hand, the definitions of Tribe, Jones and Lempert and Saltzburg are much more helpful, as they assist in pointing out the problems relating to hearsay assertions, such as the inherent hearsay dangers associated with conduct such as that of our sea captain above. But even these approaches, as will be seen later, are of limited value in solving the problem of implied assertions.

Our three examples have made one point quite clear : in trying to find the exact scope of the hearsay rule, we are indeed dealing with an "unintelligible thicket". How can one hope to ascertain the exact scope of a rule when the definition of its central concept abounds with mystery, controversy and uncertainty? The answer, it is submitted, is to examine the definitions of hearsay which have been offered, analyse their merits and shortcomings, and attempt to formulate a definition which is most in line with principle, logic and authority.

As R C Park has pointed out,[19] most definitions of hearsay fall into one of two categories:

(a) Assertion-oriented definitions, which focus on whether an out-of-court assertion will be used to prove the truth of what it asserts.

(b) Declarant- oriented definitions, which focus on whether the use of the utterance will require reliance on the credibility of the out-of-court declarant.

If we examine the assortment of definitions considered above, it is evident that the definitions of Stephen and Phipson belong to the former category, while those of Jones, Tribe and Lempert and Saltzburg to the latter. Mc Cormick's definition seems to be a curious hybrid, starting off as a classic assertion-oriented definition, but ending with a qualification which smacks of the declarant-oriented definitions of Jones and Tribe. Mc Cormick, in fact, seems to equate the two types of definitions, by qualifying his assertion-oriented definition with the words "and thus resting for its value upon the credibility of the out-of-court asserter." (My italics.) If, in fact, as Mc Cormick intimates, the two types of definition are functionally equivalent , then our major problem would be solved, as all the definitions of hearsay could then be reconciled. But as was indicated above in Example 1, this is clearly not the case. In that example, the statement of the declarant was clearly tendered to prove the truth of its contents, and yet it equally clearly did NOT rest for its value upon the credibility of the out-of court assertor. The evidence is obviously not hearsay, and this result is reached without any difficulty with the aid of our declarant-oriented

definitions; but our assertion-oriented definitions would have us classify the evidence as hearsay, and, unless an appropriate exception could be found, reject the statement as inadmissible - clearly an untenable state of affairs.

What conclusions can be drawn from the above discussion?

(a) Definitions of hearsay are generally either assertion-oriented or declarant-oriented.

(b) Depending on which definition we employ, different conclusions can be reached as to whether a statement is hearsay or non-hearsay.

(c) Examples may be given to support the inference that declarant-oriented definitions are more effective in assessing the reliability of an extra-curial statement than are assertion-oriented definitions, and as such may be superior yardsticks in confronting the problem of implied assertions.

These conclusions would seem to suggest that the declarant-oriented definitions of hearsay are preferable to the assertion-oriented definitions. To examine if this conclusion can be supported, let us examine the nature and merit of the assertion-oriented definitions more closely. These definitions typically define hearsay as out-of-court statements which are tendered to prove the truth of their contents. In other words, if X tells W something, say F, then W may not give evidence of F in order to prove that F is in fact true. Why is this so? Clearly because the truth or otherwise of F depends on the credibility of X, who is not before the court. Thus his sincerity, narrative ability, memory and powers of

perception may not be tested by the curial safeguards of the oath, cross-examination, opportunity to examine demeanour and contextual setting of his account. But is this always true? Consider the following separate situations:

(i) Where the truth or otherwise of F does not depend upon X's credibility, e g in our example where X says, "I am alive", or "I can speak". In such cases there is obviously no reliance on X's credibility, and the truth of F can be determined without the need to test X's sincerity, narrative ability, memory or perception. Here the conclusion (X is alive) can be reached without considering (to use Tribe's terminology) the belief of the absent declarant.

(ii) Where the truth or otherwise of F is not in issue, but the conclusion for which F is tendered depends on the credibility of X. For example, assume X were to say "I am Napoleon", and this were tendered to prove X's insanity; the truth of the statement is obviously not in issue, but clearly any conclusion concerning the sanity of the declarant would depend upon an examination of at least X's sincerity and narrative powers.

In situation (i), the assertion-oriented definitions required the statement to be classified as hearsay where no basis for such classification existed; in situation (ii), they required the statement to be classified as non-hearsay where at least some of the hearsay dangers existed which required examination subject to the normal procedural safeguards. It is evident then that the assertion-oriented definitions are in some cases

too wide, and in others not wide enough. Why then are these definitions not satisfactory? The answer, it is submitted, is simple to state but difficult to give effect to : A satisfactory definition of hearsay must correspond with the rationale for its exclusion. As we have seen in the last chapter, hearsay is excluded because the 'testamentary infirmities' cannot be tested by the standard adversary procedural devices. When an extra-curial statement is tendered to prove the truth of its contents, these 'infirmities' often but not always arise; furthermore, these 'infirmities' may be present in situations where an extra-curial statement is tendered for purposes other than to prove the truth of its content, although perhaps not as frequently. The assertion-oriented definitions are therefore inherently erroneous.

The declarant-oriented definitions, on the other hand, by their very definition, preserve those values on which the hearing rule is based. Tribe's triangle, in particular, expressly incorporates the hearsay dangers (or testamentary infirmities) within the very structure of his schematic definition. In this way, the learned writer avoids the inconsistencies and insuperable problems faced by those who advocate the assertion-oriented definitions.

The merits of the declarant-oriented definitions and weaknesses of the assertion-oriented definitions are illustrated at length by R C Park,[20] who analyses and criticizes the approach to hearsay adopted in Mc Cormick's Handbook on Evidence.[21] Park criticizes Mc Cormick's confusing of the two

types of definition, illustrating how the choice of definition can lead to different results. The example which Park uses[22] is the case where an extra-curial statement is tendered not to prove the truth of its content, but the falsity thereof, e g where the police question a suspect's wife, and she tells them her husband was with her at the time of the alleged crime, a fact which is demonstrably false. Although the statement is not tendered to prove the truth of its content - in fact quite the opposite - Park submits that it is clearly hearsay, as all the usual hearsay dangers are present (i e memory, perception, narrative ability).

To illustrate the superiority of the declarant-oriented definitions, Park analyses four situations where Mc Cormick, by using the assertion-oriented definition, has reached incorrect conclusions:

(1) Mc Cormick deems certain utterances non-hearsay even though they depend upon the declarant's credibility, e g Mc Cormick believes that the statement "Harold is the finest of my sons" is non-hearsay when tendered to prove that the declarant was fond of Harold.[23] The reason for this classification is that the statement is not offered to show the truth of its content. However, as Park submits,[24] the statement rests for its value on the declarant's sincerity and narrative ability, and so is hearsay in terms of a declarant-oriented definition, a conclusion which seems, it is submitted, to be correct.

(2) Mc Cormick deems some assertions non-hearsay even though they are used to show the truth of their content and

rest on the declarant's credibility. Mc Cormick regards the utterance "I believe that I am King Henry the Eighth", tendered to show the declarant's insanity, to be non-hearsay, on the basis that it is "verbal conduct offered circumstantially".[25] This approach, warns Park, is highly misleading, as it suggests that the utterance is in some way non-assertive. It is, however, assertive, says Park, as there is an intent both to communicate an idea and to affirm a proposition which could be false. To say that it is being offered circumstantially "is thus merely another way of saying that it is not being offered to show the truth of what it asserts."[26]

If evidence were led which established that the only words the declarant ever spoke were "I believe that I am King Henry the Eighth", then perhaps insanity could be inferred directly, without the need to consider the truth of the declarant's belief. But in this case, the assertion is clearly hearsay, involving a 'mental trip' into the mind of the absent declarant.

To illustrate his argument, Park gives us the example of an utterance "I wrote a will", which is tendered in evidence to prove 'circumstantially' that the declarant believed he had made a will. If we accept Mc Cormick's argument, it may be contended that the utterance is non-hearsay because an indirect chain of inferences may be employed, inferring first that the declarant believed his utterance and second that such belief was accurate. But this, as Park points out, has two serious flaws.

First, it requires us to accept that "I wrote a will" is not

the equivalent of "I believe I wrote a will", so that asserting the former does not imply asserting the truth of the latter. This, says Park, is unjustifiable.

Secondly, the argument makes use of the 'doctrine of the curative initial inference', in terms of which an utterance is not offered to show the truth of its content if the first inference in the line of proof is not the fact asserted, even though the final inference is that the fact asserted is true. Acceptance of this theory, says Park, would greatly reduce the power of the hearsay rule.

If one looks at the ease with which the hearsay rule can be side-stepped by labelling evidence 'circumstantial', one can hardly blame the courts for their frequent failure to recognize hearsay. Yet how much easier it is to recognize the hearsay nature of these utterances by using the declarant-oriented approaches of Jones, Tribe and Lempert and Saltzburg. Both "I believe I am King Henry the Eighth" and "I wrote a will" are clearly hearsay, and Tribe's triangle makes this easily apparent. In both cases, one cannot travel from A to C directly without a detour via B; the belief of the declarant is vital in both cases, and the trier is required to enquire whether he entertained this belief, and whether his belief was in fact accurate.

(3) Mc Cormick rescues some assertions which are offered to prove the truth of their content by saying they do not rely on the declarant's veracity. As an illustration Mc Cormick discusses the case of Bridges v State,[27]

where the accused was charged with molesting a young girl in his apartment after luring her there. Shortly afterwards, the girl made statements to her mother and the police describing the apartment. These statements were admitted by the trial judge, and the Wisconsin Supreme Court affirmed this on appeal, on the basis that the girl's utterances were not offered to prove the truth of their content (viz the features of the apartment) but only to show 'circumstantially' that the girl had been in the apartment.

Mc Cormick disagrees with the 'circumstantial' theory advanced by the court, but nevertheless agrees with the decision of the court by relying on the declarant-oriented part of the hybrid definition of hearsay used in the book. The utterance is not hearsay, according to Mc Cormick, because it "had value without regard to her veracity,"[28] in that it increased the likelihood of her having been in the apartment.

Park,[29] however, disagrees with Mc Cormick's approach; as he points out, "every hearsay declaration that is relevant to a fact in issue has <u>some</u> value without regard to the declarant's propensity to be accurate". (My italics). The problem, however, is <u>how much</u> value it must have before it may be classified as non-hearsay : If an utterance escapes the hearsay rule whenever it has ANY value, regardless of the declarant's veracity, then the rule is of little value; if it escapes whenever its value is not diminished very much by negative information about the declarant's veracity, then all reliable utterances will be admissible; but if it

only escapes if its value is not diminished AT ALL by such information, then Mc Cormick's analysis of Bridges v State is incorrect, as the value of the girl's utterances would be decreased by negative information about her memory, perception, sincerity or narrative ability.

The third of the above options is clearly embodied in Tribe's testamentary triangle, and is the purest application of the declarant-oriented definition of hearsay. Yet Mc Cormick, although he purports to rely on a declarant-oriented definition, advocates the first of these options, thus distorting the true nature of the declarant-oriented definition. The correct approach, says Park, is not to evade the hearsay rule erroneously by misusing the concept of circumstantial evidence, as the court did, or by bending the declarant-oriented definition, as Mc Cormick did, but to admit the utterance as a prior consistent statement of a witness.

(4) Mc Cormick evades the hearsay rule by labelling certain utterances either 'verbal acts' or 'verbal parts of acts.' These concepts, says Park, can, on a reading of Mc Cormick, be defined as follows:

(a) Verbal acts: Utterances to which the law attaches duties and liabilities, without the need for accompanying non-verbal conduct, eg the words constituting a defamation, or words of offer and acceptance.

(b) Verbal parts of acts: Utterances which help explain the significance of contemporaneous nonverbal conduct, e g words accompanying the transfer of money which de-

signate the transaction as a loan, payment, debt, bribe or gift etc.

This approach, adopted by Mc Cormick, is confusing and incorrect, says Park. It has become a means of sidestepping the hearsay rule, and is without justification. To give force to his contentions, Park discusses a few examples put forward by Mc Cormick to illustrate this approach:

(i) Defamatory words : It is not necessary to label these 'verbal acts' says Park, as the hearsay rule is not in question. Even if we use the assertion-oriented definitions, the words are not offered to show the truth of their content. Alternatively, using the declarant-oriented approach, it is not necessary to rely on the veracity of the absent declarant.

(ii) Words of acceptance, e g, "I accept your offer." Although the words are tendered to prove the truth of their content, no reliance is placed on the veracity of the declarant, and thus the utterance is not hearsay. Again, there is no need to classify this as a 'verbal act.'

(iii) Telephone calls intercepted by police while raiding a bookmaker (which will be considered again below) : These again are classified as 'verbal parts of acts', and considered by Mc Cormick as being admissible. Under our declarant-oriented definitions, it will be submitted, they are clearly hearsay, and although an argument may be advanced that they are not hearsay under the assertion-oriented definitions, Park never-

> theless expresses difficulty in understanding why such utterances should be 'verbal parts of acts.' [30]
>
> All in all, says Park, this 'verbal act' classification is without merit. Because most utterances in some way explain conduct, the approach adopted by Mc Cormick provides a "discretionary hearsay escape that can be invoked without the necessity of explaining why the evidence is trustworthy or meeting the other requirements of the residual hearsay exceptions." [31]

It would be tempting, in the light of these observations, to jettison assertion-oriented definitions of hearsay in favour of the declarant-oriented definitions along the lines of those advocated by Tribe and Lempert and Saltzburg. But this, as Park warns, is "not consistent with majority doctrine".[32] Therefore, before one may discard long-established definitions that have been frequently accepted by the courts - however vulnerable they may be to doctrinal attack - cogent arguments would have to be advanced to show that they are unsuitable in practice. Although it has already been illustrated that in many cases the assertion-oriented definitions are unworkable, to supply ourselves with even heavier ammunition against the orthodox approach, we have to penetrate a little deeper into the thicket, and examine the application of the traditional definitions to that most elusive of concepts - implied hearsay assertions.

It is not my intention at this stage to discuss at length the complex issue of implied assertions, which must await later

consideration.[33] It is essential, at this preliminary stage, however, to consider the following question: Of the two types of definition of hearsay (viz assertion- and declarant-oriented), which is better equipped to deal satisfactorily with the conceptual demands of implied assertions? It is necessary in this regard to consider separately three different classes of implied assertions.

(a) Non-assertive statements : These constitute statements of an absent declarant which were not intended by him to be assertive, for example the letters written by a deceased person in the famous English case of Wright v doe d Tatham [34] which were offered, not to prove the truth of their contents, but merely to show that the declarant conducted himself in such a manner towards the recipient of the letter, as to suggest that he considered him sane and capable of acting in a rational manner. Clearly, in such a case, we are dealing with an utterance which contains some, if not all, of the 'hearsay dangers', and in fact the court in that case excluded the evidence as hearsay. Yet our assertion-oriented definitions are of no assistance, as the letters were not tendered to prove the 'truth of their contents'. Nor is it ever possible, moreover, to say that such an assertion is offered for such purpose, because every non-assertive statement is offered to show something other than what is asserted directly by its content.

Non-assertive statements, therefore, by their very

nature, will never be hearsay according to the assertion-oriented definition, a conclusion which is reached by mechanical operation rather than sound logic. The presence of any number of hearsay dangers in such evidence, therefore, can never affect its non-hearsay status in terms of this definition.

(b) Non-assertive conduct : This constitutes conduct of an absent actor which was not intended to be assertive of the particular fact for which it is being tendered. An example of such non-assertive conduct is that mentioned above relating to a ship's captain who, after examining his ship, takes his entire family on a journey;[35] if this is offered to show that the captain believed his ship was seaworthy, then it is non-assertive.

Without determining if this is hearsay or not (which will be attempted later), let us examine the relative merits of our hearsay definitions in classifying non-assertive conduct : The declarant-oriented definitions immediately alert us to the dangers involved in accepting this evidence, as it does rest for its value on the veracity of the sea captain - was he staging a charade for the unsuspecting witness; did he perhaps not believe in the ship's seaworthiness despite his gesture of taking his family aboard (e g he may have had an urgent reason for taking his family somewhere); how great were his powers of perception or his skill in assessing

a ship's seaworthiness? These are questions which a court may well wish to ask the sea captain, who is unavailable for cross-examination and not subjected to any of the other procedural safeguards.

Now let us consider the assertion-oriented definitions. We have seen the difficulty of subjecting non-assertive statements to the orthodox test of enquiring whether they were offered to show the 'truth of their contents'; but it is even more difficult and meaningless to apply this test to non-assertive conduct. If an assertion consists not of words but physical conduct, and moreover conduct which was not intended to convey F, then it is futile to ask if that assertion is offered to prove the 'truth of its content'. We are dealing here with a chain of inferences drawn from the conduct of the actor; there is no convenient statement such as "Z told me he saw X shoot Y", which we can identify as hearsay if it is offered to show that X <u>did</u> shoot Y. The greater complexity of non-assertive conduct therefore renders the assertion-oriented definitions meaningless and unhelpful.

(c) <u>Non-assertive non-conduct or silence</u> : Assume that a shopkeeper were to assert that the merchandise he supplied to X could not have been of an inferior quality because he sold the same product to 20 other people from the same batch and he did not receive a single complaint; would this evidence be

admissible?

This is clearly a special instance of non-assertive conduct, which can be called non-assertive non-conduct.[36] This type of implied assertion illustrates better than any other the futility of attempting to apply assertion-oriented definitions in such instances; how can one speak of the 'truth of the content' of an assertion when there is in fact no 'content' or 'statement' or 'assertion' at all? But whereas these definitions are of no assistance, the declarant-oriented definitions again indicate the dangers inherent in this evidence, and these dangers are conducive to a recognition of the 'hearsay-like' nature of these assertions.

It is submitted that the following suggestions can, now, validly be made:

(A) Assertion-oriented definitions of hearsay create paradox, confusion and imprecision, and must be rejected as being theoretically and practically indefensible.

(B) Declarant-oriented definitions, even though they have their faults, have the virtue of being better tools for getting to grips with the problem of implied assertions and are, therefore, it is submitted, superior to their assertion-oriented counterparts.

(C) The advantages of the declarant-oriented definitions

are as follows:

(a) Such a definition takes into account the reason for excluding hearsay.

(b) The definition alerts one to the 'hearsay dangers' or 'testamentary infirmities' against which one must guard.

(c) The definition is simple and easy to operate in practice.

(D) Although it goes against both tradition and the weight of authority to abandon the assertion-oriented definition, it may be argued with some force that such an approach is warranted by the confusion and uncertainty that the traditional approach has elicited.

It is proposed now to take a closer look at the declarant-oriented definition, in order to probe its possible weaknesses and to see whether it requires modification.

Declarant-oriented definitions, as we have seen, typically regard hearsay as being evidence which relies, to some extent, on the veracity and perceptive powers of someone other than the witness himself. This seems to be the 'lowest common denominator' of these definitions. Various writers have elaborated on this broad common denominator to embrace specific points of detail. Questions which readily present themselves are, for instance : To what extent must such a reliance have been made before the evidence has to be excluded? What 'dangers' must be present in the evidence before it is excluded?

In response to these questions, as we have seen, there is a

difference of opinion between Mc Cormick and Park : Mc Cormick insinuates that an assertion is non-hearsay whenever it has any value that does not depend on the untested veracity of the declarant, whereas Park submits that assertions must be excluded if any reliance whatsoever is required on the veracity of the absent declarant. Jones' definition accords with Park's view, as he suggests (as we saw above) [37] that assertions are hearsay if they do not derive their value "solely from the credit to be attached to the witness himself ..." (my italics). The definition used by Tribe and Lempert and Saltzburg also agrees with this proposition; according to the learned writers, an assertion is hearsay if it requires one to make a 'trip' into the mind of the absent declarant. If any reliance has to be made on the veracity of such declarant, then clearly such 'trip' would be necessary, and the assertion would be deemed hearsay.

Which of these approaches is preferable? In view of the present rigid exclusionary principle, it could be argued that Mc Cormick's approach, providing as it does a broader base for the admission of hearsay, makes more sense than Tribe's wider definition. Certainly, if we adopt Tribe's approach, we would be faced with the untenable situation of having to exclude much valuable evidence merely because it is hearsay-like, despite various overwhelming grounds favouring its reception. However, in view of the stance which I will later submit should be taken regarding the admissibility of hearsay, Tribe's approach is more apposite. It will later be submitted that a court should have the discretion to admit or exclude hearsay, depending on the extent to which the values

of adversary trial procedure are prejudiced by its reception.[38] In the light of this flexible approach to the admissibility of hearsay, the objections to Tribe's approach fall away, and its advantages become readily apparent : it is logically consistent, and it serves to alert the trier to any hearsay-type situation. Its greatest strength lies in the fact that it is based squarely on the reasons advanced for the justification of the hearsay rule, and therefore, unlike its assertion-oriented counterpart, cannot be attacked on the grounds of doctrinal inconsistency.

Tribe's declarant-oriented model is therefore, at least in theory, useful for the identification of hearsay-type situations. But can it be used in practice as a comprehensive test for defining hearsay assertions? Park expresses doubts about its feasibility, and he advances three major reasons for his reservations:[39]

(a) Tribe's definition of hearsay is inconsistent with the majority view. This, however, is not a valid reason for rejecting it; although most definitions of hearsay are assertion-oriented, they, as we have seen, create problems. The long, confusing history of the hearsay rule and the lack of clarity with which we are faced today are a legacy of this 'majority doctrine'. As legal history has on many occasions illustrated, communis opinio is no guarantee of correctness.

(b) Tribe's definition can have no practical application in the United States, as the U S Federal Rules of Evidence have expressly adopted an assertion-oriented

definition of hearsay.[40] This criticism, however, has no relevance to countries such as South Africa, where hearsay has not yet been defined by statute, and where the definition of hearsay has to be deduced from intractible case law. It is submitted that, in countries where hearsay has not been defined by statute, an aid as ingenious as that devised by Professor Tribe can be used not only to eradicate the confusion brought about by the common law, but as a guide to what ought to be included in legislation that is intended either to clarify or to improve upon the common law. Furthermore, even in those countries where hearsay has been codified, the model devised by Tribe can still be an invaluable aid in identifying the dangers of hearsay. Even if an assertion escapes the ambit of a statutorily-defined hearsay definition, it may still constitute dangerous evidence which should be rejected, and the court ought to have a discretion to exclude it. Or, even if it is not sufficiently unreliable to warrant exclusion, the model would still help the trier properly to assess the weight to be given to the evidence by identifying the dangers or infirmities inherent in the assertion.

(c) Park asserts that Tribe's model in some instances yields results which conflict with solidly entrenched case law. He gives the following two examples.

(A) Evidence of the declarant's state of mind.

(B) Evidence of utterances which explain certain types of conduct.

Because of the importance of these categories, and the opportun-

ities each of them affords to assess the respective merits and functional efficacy of the assertion- and declarant-oriented definitions of hearsay, it is interesting and beneficial to consider both of these topics in greater depth.

(A) Evidence of the Declarant's State of Mind

Park points out that many cases have held circumstantial evidence of a declarant's state of mind to be non-hearsay, whereas it would be hearsay according to Tribe's model. It is necessary, therefore, to study the nature of evidence of state of mind more closely, and it is submitted that such evidence may be considered as falling into three distinct categories.

I. Evidence of Express Assertions of State of Mind

A person's state of mind may be proved by evidence of his direct assertions if such assertions refer to matters substantially contemporaneous with their making.[41] To take an example, if the issue in question is whether X had acquired a domicile of choice in South Africa, then evidence may be led that X said, "I intend to remain permanently in South Africa."[42] It is not settled, however, whether such assertions are admitted as original evidence or by way of a hearsay exception. Wigmore[43] contends that such declarations constitute an exception to the hearsay rule, and I submit that this is correct for the following reason: The admission of the evidence above relating to domicile depends on the following set of inferences :

(a) W testifies that X said "I intend to remain permanently in South Africa."

⇒ (b) X <u>did</u> actually say "I intend to remain permanently in South Africa."

⇒ (c) X actually did <u>intend</u> to remain permanently in South

Africa.

Therefore, if we refer to our 'hearsay triangle', it will be seen that the following hearsay dangers are present in the admission of W's testimony:

(i) Honest error in transmittal.

(ii) Dishonest distortions in transmittal.

(iii) Ambiguity (or errors in narration).

(iv) Insincerity on the part of the declarant X.

It will be noticed, further, that the dangers of faulty memory or perception are not present, because the final inference involved in normal hearsay assertions (viz that the declarant's belief reflects the reality of the situation) is not required to be drawn. This is because the conclusion, C, for which the evidence is tendered in such cases coincides with the belief of the declarant, B, i e the evidence is offered to show the belief of the declarant, and not any fact related to such belief (such as the truth of the content of the assertion believed by the declarant). But is this sufficient reason for calling the evidence 'non-hearsay'? It is submitted that it is not, as the presence of the other hearsay dangers indicates that the reliability of the evidence is decidedly questionable. The 'trip' into the mind of the declarant is still required, and the only way such evidence can be admitted is by way of an exception to the hearsay rule.

II. Circumstantial Evidence of a Declarant's State of Mind

A person's statements may be used 'inferentially' or 'circumstantially' to show his state of mind. That such evidence is admissible is incontrovertible, but the nature of such evidence and the grounds for its admissibility are somewhat more conten-

tious.

In this regard, consider the approach of the court in the following cases:

(a) The South African case of Estate De Wet v De Wet[44] : In this case, the issue before the court was whether a disposition by an insolvent constituted an undue preference. Evidence was tendered that the insolvent had at the time made a statement concerning the state of his assets and liabilities, indicating that he was in a precarious financial position. The court held that the evidence was admissible, not to show what his assets and liabilities were, but to show that he was aware of his precarious position. The basis for this decision was set out by Watermeyer J[45] as follows:

> "I am not sure that statements made by an insolvent should be classified as hearsay in an action for undue preference against a third party. Hearsay evidence is evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement; but when evidence of statements of non-witnesses is tendered to prove, not the truth of the statement, but the state of mind of the person making it, such state of mind being the issue before the Court, then I think that such evidence is not hearsay, but original evidence."

The reasoning of the learned judge is thus based firmly on an assertion-oriented definition of hearsay, the inadequacy of which was discussed above. In fact, even though the learned judge held such evidence to be original evidence, there are three indications in his judgment that seem to indicate a dissatisfaction with this conclusion, and a tentative inclination away from it:

(i) The learned judge stated that such evidence was "tendered for the purpose of showing the insolvent's

knowledge at the time, and for the purpose of drawing inferences from his statements to his state of mind,"[46] (my italics). This inference coincides exactly with the 'mental trip' from A to B in our hearsay model, which is accompanied by the normal hearsay dangers of narration (or ambiguity) and insincerity. This acknowledgment is inconsistent with a classification of such evidence as non-hearsay.

(ii) Watermeyer J added the important proviso that such evidence would only be admitted

> "so long as [it] is given at a time when there is no reason, or no probable reason, why he should be attempting to give a misleading impression as to his state of mind ... I can see a good reason, for instance, for excluding statements which an insolvent makes at the time of his examination by the trustee in insolvency ... because then a state of circumstances has arisen which may lead him to wish to give a false impression of his previous state of mind."[47]

Clearly the learned judge has here recognized the hearsay danger of insincerity latent in such evidence, and would only envisage admitting such evidence if such danger were not present. But what if the danger were present; on what basis should it be excluded? The learned judge tentatively suggests "it might almost be termed irrelevant",[48] but with respect it seems clear that the reason is that such evidence is unreliable, i e it is hearsay. The only logical basis for admitting such evidence, provided such dangers are found not to be present,

is by way of a hearsay exception. It is illogical to say that evidence is non-hearsay but only admissible if hearsay dangers are not present.

(iii) Support for this contention may be found in the following dictum of the learned judge:

> "Hearsay is excluded because of the doubt and suspicion which attaches to its accuracy. The reason for the exclusion of hearsay evidence is well illustrated by the exceptions; statements by deceased persons against their interest, dying declarations, entries in public registers are all admissible, though hearsay. The reason why such statements are admitted is that they are made at a time and under such circumstances that they are very unlikely to be false. I think the same principle can be extended to statements made by an insolvent at a time when something has occurred which may have caused him to wish to give a false impression of his previous state of mind, even if such statement is tendered to prove state of mind only and not the truth of the statement." [49]

It is submitted, with respect, that although the learned judge attempted to reconcile the exclusion of unreliable evidence (subject to the hearsay danger of insincerity) with his theory that such evidence is original evidence according to his assertion-oriented definition of hearsay, this dictum clearly suggests that the only logical way of explaining the reception of such assertions is by regarding them as being exceptionally admitted hearsay.

(b) The decision of the Court of Appeal for Saskatchewan in R v Wysochan:[50]

In this case, the accused was charged with the murder of one Antenia Kropa, who was shot in circumstances in which the only possible suspects were the accused and the de-

ceased's husband, Stanley Kropa. Evidence was tendered by the Crown that shortly after the shooting, Antenia Kropa had said to one Tony Sokolowski, "Tony where is my husband?", and that when her husband was near her, she had stretched out her hand to him and said "Stanley, help me out because there is a bullet in my body." Later, on her way to hospital, she had said, "Stanley, help me, I am too hot."

The court a quo had held the evidence to be admissible, and this decision was contested on appeal. Haultain CJS, delivering the judgment of the court, observed that the statements in question came within the class of utterances described by Wigmore as follows:

> "Utterances as indicating Circumstantially the Speaker's Own State of Mind. The condition of a speaker's mind, as to knowledge, belief, rationality, emotion, or the like, may be evidenced by his utterances, either used testimonially as assertions to be believed, or used circumstantially as affording indirect inferences. Utterances of the former sort may be received under the Exception for Statements of a Mental Condition ... " [51]

Haultain CJS was in no doubt that the evidence in question fell clearly within the latter category stated by Wigmore, on the basis that

> "[t]he utterances in question contained no statement of facts necessary to be proved. They are only evidence ... of a certain feeling or attitude of mind, and it was for the jury to decide what inferences might be drawn from them." [52]

Professor S A Schiff, however, raises some highly pertinent questions concerning the basis of this decision: [53]

(i) Did not the purpose for which the Crown offered the testimony clearly demand the jury's trust in Mrs

Kropa's unexamined (and unexaminable) testimonial factors?

(ii) Were there not several intensely strong hearsay dangers inherent in the testimony?

(iii) Is it inappropriate then to regard the testimony as evidence of Mrs Kropa's implied assertion that her husband did not shoot her?

(iv) Should the testimony not therefore be characterized as hearsay?

To answer these questions, let us again consider the set of inferences involved in Wysochan's case :

1. The statements of Mrs Kropa as testified to by the witnesses (e g Tony Sokolowski) relating to her husband.

⇒ 2. Mrs Kropa actually made these statements.

⇒ 3. Mrs Kropa believed her husband not to be implicated in her shooting.

⇒ 4. Her husband was not involved in the shooting.

Clearly the dangers relating to errors in transmittal in this case do not exceed those relating to any other testimony, and so must be ignored. However, all the other hearsay dangers are certainly present. Did Mrs Kropa believe her husband to be innocent? She could well have taken pity on him and intentionally made an effort to exculpate him by her approach to him after the shooting. Alternatively, she may have had no idea who shot her, and her request for her husband may merely have expressed her desperate need for comfort in her state of stress and

shock. In other words, the dangers of insincerity, narration, memory and perception are as prevalent as in any other hearsay assertion.

This illustrates the point made earlier by Park, viz that the labelling of evidence as 'circumstantial' is often a device for side-stepping the hearsay rule and its inexorable consequences, but is nevertheless logically indefensible. Schiff criticizes the decision in Wysochan's case [54] by arguing that it is one thing to admit evidence of a declarant's words or conduct to show his state of mind when that very state of mind, and not the external event causing it, is relevant; but it is quite a different thing to admit such evidence when the external event causing the state of mind is relevant and the proponent offers the evidence to establish that event. Or, put in another way, Schiff beliefs that we must distinguish two situations: The first deals with evidence which is used to establish the absent declarant's state of mind, and nothing else, i e our enquiry goes only as far as B on our schematic model, and only involves the trip from A to B. The second relates to evidence tendered to establish the event which caused the state of mind, i e our enquiry goes all the way to point C, involving both trips including the one from B to C.

Is there any merit in distinguishing these two situations? Clearly, whereas the first situation only presented the hearsay dangers of insincerity and ambiguity, the second situation brought into question the two additional dangers of memory and perception. However,

the fact remains that in both cases the evidence is substantially unreliable and tainted by the testimonial infirmities associated with hearsay. So, while Schiff's remarks and criticisms are certainly valid, they perhaps do not go far enough; evidence of a person's statements or acts, whether used to establish his state of mind alone or the external event causing his state of mind, is patently hearsay-like, and the only logical way to admit such evidence without violating the rationale underlying the hearsay rule, is by way of an exception to the rule, the first alternative set out by Wigmore in the passage quoted in Wysochan's case.

Therefore, returning to the facts of the case, it should have made no difference whether the evidence of Mrs Kropa's statements were tendered to prove her state of mind (i e her belief that her husband was innocent) or the external event causing such belief (ie the fact of her husband's innocence); in both cases, the evidence contains sufficient dangers to be labelled hearsay, the only avenue for admission being an exception to the hearsay rule.

(c) The decision of the Privy Council in Ratten v The Queen: [55]
The facts of this case are as follows. The accused was charged with the murder of his wife. He admitted having shot her, but contended that he had done so accidentally, while he was cleaning his gun. Evidence was led by the prosecution, in an attempt to rebut this defence, that the deceased had made a telephone call to the police at a time

shown to be just before the time of the shooting. The evidence, given by the telephonist at the local exchange, was analysed by the court and reduced to the following elements:

1. At about 1.15 pm the number Echuca 1494 (the number of the accused and his wife) rang. I connected that number.
2. I opened the speak key and said "Number please."
3. A female voice answered.
4. The voice was hysterical and sobbed.
5. The voice said "Get me the police please."

The defence objected to this evidence on the ground that it infringed the rule against hearsay. The Full Court of the Supreme Court of Victoria held the evidence admissible, and the matter went on appeal to the Privy Council. Lord Willberforce considered the above five elements and came to the following conclusions : Items 1. to 3. were relevant to show that a call was made (contrary to the evidence of the appellant), only some 3 - 5 minutes before the shooting, by a woman at the said address. As the deceased was the only woman at that address at the time, it could only have been she who had made the call. Items 4. and 5. were relevant as showing that the deceased was at the time in a state of hysteria or fear. The mere fact that evidence of a witness included evidence as to words spoken by another person who was not called was not considered a problem, the reason advanced by the court being that

> "[w]ords spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', ie as establishing some fact narrated by the words ... " [56]

Thus the court adopted a very narrow assertion-oriented definition of hearsay, according to which the evidence of the telephonist was allowed to escape the clutches of the hearsay rule.

The correctness of this approach is questioned once again by Schiff,[57] who suggests that the court was once again required to accept the trustworthiness of the deceased wife's unexamined testimonial factors, and asks whether the same result would follow if we applied a hearsay-danger analysis to the facts of the case. Clearly the same result would not follow; the set of inferences which the court would have to make would necessarily invoke the normal hearsay dangers. In fact, Ratten's case is indistinguishable from the case of Wright v Tatham,[58] which was relied on by counsel for the accused in support of the following contention :

> "The statement in the present case is hearsay because of the use the jury were invited to make of it. It was tendered, if not to establish the truth of the statement, at least to establish the truth of what the jury were invited to infer from the words said by the witness to have been used. This is clearly akin to the purpose of establishing the truth of the statement." [59]

The merit of this argument can be seen by examining the chain of inferences involved in Ratten's case :

1. The telephonist's evidence that (i) The voice was hysterical and sobbed, and (ii) The voice said "Get

me the police."

⇒ 2. The deceased was hysterical and asked for the police.

⇒ 3. The deceased believed she was in danger.

⇒ 4. The deceased was in danger.

⇒ 5. The shooting was not accidental.

This set of inferences abounds with hearsay dangers. Whether evidence tendered in 1. is used to establish 2., 4., or 5., there are these dangers present in varying degrees. If our enquiry ends at 3., the dangers of insincerity and ambiguity present themselves, while if we go on to 4. or 5. then the dangers of faulty memory and perception must be added. In both cases, the reception of the evidence involves reliance on the unexamined testimonial factors of the absent declarant, or to use Park's terminology, the value of the evidence would be substantially diminished by negative information concerning the declarant's veracity. We therefore unavoidably have a hearsay-type situation.

Conclusion: By this time it will have become apparent that it may be misleading and inaccurate to consider the 'circumstantial' use of a person's statements or acts to show 'inferentially' his state of mind as not involving "any breach of the hearsay rule because they are not used to prove the truth of anything that he says."[60] This approach results from a strict adherence to an assertion-oriented conception of hearsay, a conception which, I have submitted, is inadequate and untenable. A declarant-

oriented perspective of hearsay is required in order to appreciate the values behind the hearsay rule, and to come to terms with implied assertions. If one bears this in mind and looks at the cases discussed above, which reflect the prevailing attitude of the courts towards the issue of the 'circumstantial' state of mind of the declarant, the following points may be made :

(1) <u>The declarant's state of mind may be used 'inferentially' in three ways</u> :

(a) Where his state of mind is not a fact in issue, and evidence is tendered that X believed a fact to be true to prove the existence of that fact, eg "I believe the brakes are bad."

⇒ X actually believed the brakes are bad.

⇒ The brakes are bad in fact.

(b) Where his state of mind is not in issue, and evidence is tendered of X's acts or statements to show that he entertained a certain state of mind, in order to establish an external event related to that state of mind (such as its cause), eg the facts of <u>Wysochan's</u> case,[61] where the deceased's statements were offered to show she believed her husband to be innocent, which would establish his innocence in fact.

(c) Where his state of mind is in issue, and evidence is tendered of X's acts or statements solely to establish that state of mind, e g the facts in <u>Ratten's</u> case,[62] where the deceased's statements were

offered to show that she was in a state of terror or hysteria.

(2) <u>These three uses of 'inferential' state of mind may be considered as follows</u> :

(a) This is clearly a hearsay escape, or a device to avoid the hearsay rule. No matter which definition of hearsay we choose, the evidence is hearsay and inadmissible.

(b) In this case, as with (c) below, different results are obtained depending on which definition of hearsay is used. Under the assertion-oriented definitions, the evidence is original, whereas the declarant-oriented approach classifies the evidence as hearsay; all the hearsay dangers are present in this case, as our 'trip' includes both sides of the 'hearsay triangle'. This situation is analogous to the facts and decision reached in <u>Wright</u> v <u>Tatham</u>,[63] where the following chain of inferences was employed :

(i) The letters of the declarant, addressed to the testator, containing normal commercial correspondence.

➔ (ii) The declarant believed that the testator was sane and in full possession of his faculties.

➔ (iii) The testator was competent to make a valid will.

As was pointed out above, the court in this case held the evidence of the declarant's statements in the letters to

be inadmissible on the basis that it was an implied hearsay assertion; i e although the letters were tendered in order to prove not the truth of the contents thereof, but the state of mind or belief entertained by the declarant, such evidence could not escape the hearsay ban. For, as Parke B. stated :

> "Proof of a relevant fact, which is not itself a matter in issue, but is relevant only as implying a statement or opinion of a third person on a matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would itself be inadmissible." [64]

We are dealing here with implied hearsay assertions, although this has not always been recognized by the courts; in practice the courts admit implied assertions in cases where express assertions to the same effect would be inadmissible, and yet the courts label this evidence 'original'. This is obviously incorrect, and the only way the reception of this evidence may be justified is by conceding their hearsay nature and allowing them by way of exception.

(c) If we employ our declarant-oriented model, we see that these situations also encounter hearsay-type dangers. Even though our trip only involves the first leg of the triangle, there are still potentially two hearsay dangers which have to be tested and overcome. As we have seen from cases such as De Wet,[65] we can only infer a state of mind from a person's acts or statements if there is no motive to misrepresent, i e in the absence of the hearsay danger labelled 'insincerity'. Therefore,

as was argued above, such evidence cannot be referred to as 'original'. Although fewer hearsay dangers are latent, we nevertheless are still dealing with evidence which at the very least must be considered 'hearsay-like'.

(3) What then must we do with 'circumstantial' evidence of state of mind?

This question brings us to the focal point in the dilemma surrounding a search for the definition of hearsay : If we apply the assertion-oriented definition of hearsay, then highly unsatisfactory consequences follow; evidence such as that in class (b) above would be considered 'original' and admitted without even alerting the court to the possibility of the hearsay dangers which potentially lurk in these assertions. Similarly, the class (c)-type evidence would also be admitted without the necessary scrutiny. However, if we apply the declarant-oriented definition (along the lines of Professor Tribe's model), then all three classes of evidence above would be considered to be hearsay.

This latter approach would have the virtue of alerting the court to the infirmities inherent in this type of evidence, but would have the following drawback - we are faced with decisions of the highest authority which require all hearsay to be excluded unless it can be admitted under an exception that already exists, either by statute or under the common law. The common law exceptions are rigidly defined, and evidence which is regarded as hearsay accord-

ing to Professor Tribe's approach, but as non-hearsay according to the traditional formulation, would, if it were to be received, have to satisfy stringent requirements that are almost absurd, at times, in their technicality. Many cases involve the necessity of drawing inferences of state of mind from the declarant's acts or statements where there is very little possibility of insincerity or ambiguity, and it would be undesirable to require these assertions to comply with strictly-controlled hearsay exceptions. Clearly a more flexible approach is needed, which would involve a complete re-evaluation of the hearsay rule and our notion of hearsay.

The reason for this reconsideration is simple : We have no satisfactory, comprehensive definitions of hearsay, yet we have a clearly defined and entrenched rule that all hearsay must be excluded (unless it can be rescued by one of the exceptions). The definitions that have been formulated by the courts do not always work, and at times may lead to undesirable results; the definitions that have been proposed by critical writers have their merits and may, as we have seen, be better than those of the courts, but they do not harmonize well with the case law. It is submitted, therefore, that there is a need to re-think our whole hearsay doctrine.

In attempting this re-consideration, it is important to settle that which we know to be true about hearsay. As we have seen, the only thing that can be said with any degree of confidence about hearsay is the reason why we

should have a hearsay rule at all. 'Hearsay' must be excluded because it is unreliable - it contains what we have conveniently called 'hearsay dangers', which have not been subjected to standard procedural evaluation. These hearsay dangers are present in varying numbers and varying degrees in various forms of evidence. This leads us then on to our second important truth about hearsay, namely that hearsay is not an absolute concept; it is something which on a scale between 0 and 10 may occupy any grade on that scale. The evidence of W that "X told me he saw Y shoot Z" may occupy a grade approaching 10 on the scale if used to establish that Y shot Z, and a grade approaching 0 if used to show that X was capable of speech. These are both clear-cut examples. But what of class (c)-type assertions above, which are used to establish 'inferentially' the declarant's state of mind? What grade would reflect the value of the telephonist's evidence in Ratten's case, used, as it was, to establish that the deceased was in a state of fear and hysteria? Clearly this is a border-line case, a situation which belongs in the twilight zone of hearsay. How can one be expected to devise an all-encompassing definition of hearsay which would satisfactorily classify all 'hearsay-like' assertions, as well as a rule which would correctly exclude those assertions which are undesirable and admit those which should be admissible?

Obviously this is impossible; hearsay is not a monolithic concept, but a variable one, a factor which is present in

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Obviously this is impossible; hearsay is not a monolithic concept, but a variable one, a factor which is present in

many forms of evidence in varying degrees of significance. It is submitted, therefore, that it is incorrect to consider a statement or an assertion as being 'hearsay'; it is easier and more accurate to think of 'hearsay' as an adjective, and one which, like other adjectives, is subject to degrees of comparison. It is therefore sounder to view assertions as being 'hearsay-like', or containing varying numbers and degrees of hearsay dangers.

If one looks at hearsay this way, devising a 'hearsay rule' follows more easily. It would naturally be arbitrary and artificial to decide on a 'cut-off point' on our hearsay scale, say at point 5, and exclude all assertions above that cut-off point. This is because hearsay, like relevance, should be a matter of experience and logic, and where the line should be drawn should depend on the circumstances of a particular case, on factors such as fairness, convenience and policy. The exclusion of hearsay should therefore be a matter for the discretion of the judge, who, ideally, should be aided by a formulation of hearsay which is both flexible and practical, a definition which points out the dangers inherent in hearsay-like assertions, and the factors (which may or may not be present) which might reduce or even eliminate such dangers entirely.

It is submitted therefore that the definition of hearsay should ideally take the form of a workable guide to assist the trier in the exercise of his discretion. The exact form that this guide should take will be considered at a later stage after a discussion of implied assertions.[66]

This conception of hearsay is, however, very much an idealized suggestion, an approach which could only be incorporated into our law by way of legislation. For the moment, we must consider the law as it is according to our common law, a picture which although muddled reflects the present legal reality. How then does 'circumstantial' evidence of state of mind fit into this picture? As we have seen, it is conceptually incorrect to consider such evidence 'original'; it must be recognized as being hearsay, and accordingly excluded unless it can be rescued by one of the exceptions to the rule. Such an exception was mentioned by Wigmore[67] above in the passage quoted in Wysochan's case, viz "Exception for Statements of a Mental Condition". This approach would achieve some form of consistency in our treatment of evidence of state of mind, for just as evidence of express assertions of state of mind is hearsay and admissible by way of exception, in the same way implied assertions to the same effect (referred to erroneously as 'circumstantial' evidence of state of mind) are also hearsay and admissible under this exception. This approach is also compatible with the decision in Wright v Tatham,[68] which stipulated that implied assertions must be excluded in all cases in which express assertions to the same effect would be excluded.

III. The Public's State of Mind - Public Survey Polls

Are the results of public survey polls hearsay or non-hearsay? If they are hearsay are they admissible in

terms of a hearsay exception or not? Before attempting to analyse the nature of these polls, let us look at the attitude of the courts towards this question.

(a) The United Kingdom

The approach of the Courts in the United Kingdom is singularly unhelpful : Whereas in earlier years the admissibility of such surveys was not originally accepted without qualification,[69] the more recent cases seem to accept the results of market surveys. However, as Cross[70] points out, this evidence has been received "without consideration of the theoretical problems involved". For example, in the case of General Electric Co v General Electric Co Ltd,[71] the court had to consider the admissibility of the result of a market research poll conducted to investigate whether the trade mark of the English company (viz "G.E.C.") was likely to be confused with that of the New York-based General Electric Company (viz "G.E."). The questionnaire was conducted by market research experts, who adduced evidence to interpret the answers. The trial judge rejected the evidence on the ground that the questions were misleading; the Court of Appeal held that the questions were not misleading; the House of Lords held that the questions were misleading to an extent, and the court (per Lord Cross) suggested an alternative procedure by way of interlocutory proceedings before trial. But no-

where was it suggested that the evidence of public surveys should be excluded on the grounds that it infringes the rule against hearsay.

(b) Canada

The approach of the Canadian Courts, although case law on this point is scanty, can be determined by examining the decisions of three Canadian appellate courts, handed down within the space of three years :

(i) Regina v Murphy [72]

In this case the New Brunswick Supreme Court, Appellate Division, had to consider the admissibility of a survey conducted by a professional sociologist, which took the form of standardized interviews with students to ascertain their reaction to an article which, it was alleged, was calculated to bring the New Brunswick Supreme Court into contempt, and which formed the subject of a contempt of court charge against the accused. This evidence was held to be 'clearly inadmissible',[73] apparently, but not expressly, by invoking the rule against hearsay.

(ii) Regina v Prairie Schooner News Ltd [74]

The accused in this case was convicted on charges of having obscene matter in its possession for the purpose of publication, distribution or circulation. According to Canadian law, a publication is obscene if its dominant purpose is the 'undue' exploitation of sex, and the test for 'undueness' is whether it exceeds the 'standards of the community.' Evidence

was tendered on behalf of the accused of a survey conducted by a law graduate in the form of a questionnaire presented to an adult evening class at the University of Winnipeg and to 25 employees of the Canadian National Railways. The trial judge held the survey to be inadmissible on the ground that the said law graduate was not an expert and on the further ground that the survey would not assist the judge in determining the community standard, and this point was taken on appeal.

The Court of Appeal for Manitoba confirmed the decision of the trial judge, for the following reasons (expressed by Dickson JA): If the survey was intended simply as a "non-scientific amalgam of the views of a small number of unscientific people",[75] then it clearly falls foul of the hearsay rule; if it was intended to reflect the fact that a certain opinion was held by the community, then the sample must be a "scientifically selected sample within an acceptable universe".[76] This was clearly not the case here, as the law graduate was not an expert, the survey was not scientific, and the "miniscule and parochial sample selected" did not constitute a "prototype of national tolerance to the particular publications" which formed the subject of the charges in this case.

It would seem then that the court would have been content to allow evidence of a properly conducted survey which was "scientifically selected" within

an "acceptable universe".

(iii) Regina v Times Square Cinema Ltd [77]

In this case, several judges of the Court of Appeal for Ontario in an obiter dictum approved the admissibility of a public opinion survey of a similar nature to that in the Prairie Schooner case, provided certain conditions were satisfied. According to Mc Gillvray JA, these conditions were as follows : [78]

1. The questions asked must demand factual information, not subjective reactions.
2. The survey must be conducted in a proper manner (eg no leading questions).
3. The actual interviewers must testify at the trial.
4. The persons interviewed must be representative of the appropriate 'universe'.

According to Jessup JA, vital considerations included : [79]

1. Whether public opinion polling is, in fact, a science.
2. Whether approved statistical methods were used.
3. Whether adequate social research techniques and interviews were employed.
4. Whether the questions asked were scientifically evocative of a fair sampling of opinion.

The Canadian courts, therefore, seem to favour the ad-

mission of the results of public opinion polls subject to certain provisos or conditions.[80] But this approach is not much more helpful than the approach of the English courts. Nowhere has an analysis been attempted of the hearsay dangers involved in accepting the results of these surveys, or of whether these dangers are reduced by the 'conditions' proposed for their admissibility.

Let us consider the chain of inferences which counsel for the appellant in the Prairie Schooner case required the court to draw from the evidence tendered :

1. Evidence tendered by a law graduate of the results of a survey conducted by himself and another, that consisted of questions relating to the attitude of those interviewed towards the publications in question, and answers expressing a belief that the publications were not obscene.

⇒ 2. The people interviewed believed that the publications were not obscene.

⇒ 3. The publications were in fact not obscene, as they did not exceed the "standards of the community".

Acceptance of this chain of inferences would involve ignoring the usual hearsay dangers, illustrated by the following questions :

1. Do the people interviewed really entertain this belief? Perhaps they do not, but they either
   (a) misunderstood the questions or expressed themselves incorrectly (errors in narration), or
   (b) intentionally misrepresented their state of mind (the

danger of insincerity.)

2. Does this belief that the material was not obscene mean that the "standards of the community" were not exceeded? Perhaps not, as
   (a) the belief was not representative of the community, or
   (b) the belief was irrational (i e the declarant's powers of perception were impaired.)

Do the safeguards or conditions envisaged by the Canadian courts adequately deal with these dangers? In this regard, Prof. Schiff poses the following questions:[81]

1. Which of these conditions relate to reducing hearsay dangers and which to the problem of accommodating probative value and prejudicial effect?
2. Assuming that a particular survey satisfies the various prerequisites in the Prairie Schooner and Times Square cases, are the hearsay dangers sufficiently reduced to justify the admission of the results of that survey?

In answer to the first question, it seems that most of these prerequisites relate to the probative value of the survey, i e its relevance and weight, and that the only condition which relates to any of the hearsay dangers is the requirement that the persons interviewed must be representative of an appropriate universe. Compliance with this requirement would allow us to draw inference (3.) from inference (2.) above, ie it would eliminate the danger of faulty perception, because the mere fact that a properly selected, appropriate 'universe'

held a particular belief would entitle us to conclude that such belief reflected the view of that sector of which that 'universe' is representative.

None of the requirements, however, reduced the other dangers, namely narrative ability and insincerity. Even if a survey is scientifically conducted among people representative of an appropriate universe, there is still nothing to entitle us to draw inference (2.) from the first step in the chain above. There is no adequate substitute for the curial procedural methods (such as cross-examination, etc) to test the declarant's narrative abilities and sincerity, and the absence of the opportunity to apply these methods illustrates the hearsay-like quality of this type of evidence. To give an example, even if the survey in the Prairie Schooner case had complied with the conditions laid down by the court, could it not be possible that the people interviewed, when told of the purpose of the survey, felt sympathy with the accused and intentionally misrepresented their beliefs in the questionnaire so as to allow the accused to escape prosecution?

The Canadian courts have thus not entirely solved the problem of public survey polls; although some guidelines have been laid down, the basic hearsay problem has not been tackled directly, and the courts have left unanswered the question of whether such evidence may (if the conditions are satisfied) be admissible as original evidence or as an exception to the hearsay rule.

(c) The United States

A review of the United States decisions was conducted by the courtsin the Canadian decisions of R v Prairie Schooner News Ltd [82] and R v Pipeline News. [83] In these decisions, the courts pointed out that no general statement of principle has emerged from the United States courts. What has, however, clearly emerged is that "a marked, if reluctant, change of attitude has occurred over the years." [84] Whereas in the earlier cases [85] evidence of public survey polls was usually rejected as infringing the rule against hearsay, on the basis that it was an attempt to show indirectly the unsworn opinions of persons not called as witnesses, the more recent trend has been to allow such evidence, particularly in cases of trade mark infringement and unfair competition. The reception of this evidence falls into three categories of cases : those which hold that such evidence is not hearsay at all; [86] those which hold that it falls within the exception to the hearsay rule of "statements of present state of mind"; [87] and others which allow such evidence without comment. In the case People v Franklin National Bank, [88] for instance, the New York Supreme Court set out the principles of law on this subject as follows:

> "A party endeavouring to establish the public state of mind on a subject, which state of mind cannot be proved except by calling as witnesses so many of the public as to render the task impracticable, should be allowed to offer evidence concerning a poll which the party maintains reveals that state of mind. Not only does this fit the pattern of the 'state of mind exception' to the hearsay rule, but it is not hearsay at all, since it is the fact that such answers were given to which the witness swears, and not the truth or value of the facts contained in such answers."

This approach (ie labelling evidence of surveys as 'non-hearsay') is totally unjustifiable, it is submitted, and illustrates the pernicious consequences of adhering to an assertion-oriented definition of hearsay. If we consider the potential hearsay dangers involved, then the evidence must unavoidably be categorized as hearsay, and the only basis for admitting such evidence would be by way of exception to the rule, viz Wigmore's exception relating to mental condition.[89] As was pointed out in a note in the Harvard Law Review,[90] this exception "seems to be based upon a factor which leads the courts in some cases not to classify the evidence as hearsay at all : the necessity for the evidence outweighs the lack of opportunity for cross-examination." The courts have allowed the fact that it is impracticable to procure all the interviewees as witnesses to obscure a clear vision of the nature of this type of evidence. While the need for a certain type of evidence may justify its admission by way of exception, it does not justify a disregard of principle and logic by ignoring the hearsay dangers inherent in such evidence.

In an article by R C and T C Sorensen,[91] the authors advance the view that opinion research evidence may be subject to rejection on the grounds of hearsay, but add[92] that this problem can be overcome if the following four requirements are satisfied :

1. Such evidence is presented as proof of the fact that such opinions do exist and were offered, rather than to prove the truth of the statements that were

asserted therein. In short, the responses 'observed' by the opinion researcher in determining the public state of mind are like the "conclusion of an occulist who peers into one's eye".[93]

2. The evidence is necessary and the best possible evidence available to show such a state of public or mass opinion, preferable to an interminable parade of witnesses or any other substitute purporting to represent the public or mass.
3. The opinions and feelings thus revealed do represent the active and actual state of mind of the public, rather than a momentary whim.
4. The evidence was obtained by research scientifically conducted under circumstances where a sincere and accurate statement naturally would be uttered so that there exists at least a circumstantial probability of the reliability of such evidence.

If these four conditions are satisfied, the authors contend, then such evidence is admissible, either because it is not hearsay at all, or because it falls within the scope of the recognized exception relating to state of mind referred to by Wigmore above. Which of these views is preferable?

Compliance with the first condition would eliminate the 'right-leg' dangers of faulty perception and memory, as the court is only required to infer that the absent declarant held a particular belief, not a fact to which that belief pointed. Compliance with the fourth re-

quirement would eliminate the so-called 'left-leg' dangers of ambiguity (as the statements are 'accurate') and insincerity (as the statements are 'sincere'). So theoretically, we are left with a situation where none of the recognized hearsay dangers is present at all. Clearly a strong case for admissibility exists, but is it correct to label such evidence non-hearsay? If W were to testify that "X told me he saw Y shoot Z", in circumstances where X's sincerity, narrative ability and powers of memory and perception were without blemish and unquestionably sound, would a court allow W's testimony as 'original' evidence? Clearly not; what must be borne in mind is that evidence is not hearsay merely because of the presence of hearsay dangers, but because of the potential of such dangers in evidence which has not been subjected to the procedural safeguards of cross-examination, the oath, observation of demeanour, and testimonial contextual setting. There are no satisfactory substitutes for these devices for testing evidence for potential hearsay dangers. Therefore no matter what assurances the court may be given as to the sincerity, narrative ability, memory and perception of an absent declarant, unless his evidence is subjected to these devices, it will be considered hearsay, and excluded unless it satisfies one of the recognized hearsay exceptions.

For this reason, it is submitted, the view that evidence of public survey polls is hearsay but in certain circumstances admissible by way of exception to the rule, is

preferable.

(d) New Zealand

The question of the admissibility of public survey polls was faced by the New Zealand courts in the recent case of Customglass Boats Ltd v Salthouse Brothers Ltd,[94] where Mahon J examined the law on this subject in Canada, the United States and the United Kingdom and came to the conclusion that such evidence is admissible provided the cautionary procedures recommended by R C and T C Sorensen[95] (referred to above) were followed. The admission of such evidence was necessary, because it was undesirable "in cases involving trade mark infringement or passing off where evidence of reputation is relevant ... to compel a party to produce in the Courtroom an interminable parade of witnesses to depose individually as to their knowledge and understanding ...".[96]

The learned judge's view of the law regarding the admission of public survey polls is succinctly expressed in the following dictum:

> "The evidence obtained by research survey is in my view legitimate proof of the fact that the opinions obtained had in fact existed, whether rightly held or not, and on that view of the matter it is my opinion that such evidence is not hearsay at all and that, even if it did fall within the technical concept of hearsay or representing a collation of individual statements made out of Court, then the evidence would still be admissible by way of exception to the hearsay rule because it exhibits the existence of a state of mind shared in common by a designated class of persons."[97]

For the reasons already expressed above, it is submitted that the latter alternative expressed by the learned judge is preferable.

(e) South Africa

The problem of public survey polls has recently come to the fore in South Africa in two conflicting cases. Both cases involved applications for interdicts to restrain competitors of the respective applicants from distributing their products in containers similar to those used by the applicants. In both cases, evidence was tendered of the results of market research surveys which reflected the interviewees' opinions concerning the reputation of the applicants' products and the association formed between their products and their distinctive containers. Yet the courts, on the same facts, reached opposite conclusions regarding the nature and admissibility of this evidence.

In Rusmarc (SA) (Pty) Ltd v Hemdon Enterprises (Pty) Ltd, [98] the court held this evidence to be nonhearsay and admissible. If this were not so, Coetzee J argued, then the results would be "quite impracticable", and would necessitate calling all the interviewees as witnesses. "The result", the learned judge added, "may well be to discourage litigants from presenting in suitable cases, this kind of evidence which may aid greatly the Court in its search for truth." [99]

The reasons for the learned judge's conclusion are contained in the following dictum :

> "What contributed to my decision to admit this evidence was possibly a natural reluctance to deprive myself of potentially valuable and reliable material of a scientific nature which may assist in the solution of what could have been a tantalizing factual problem. From the strict admissibility point of view, however, I was nevertheless unpersuaded that this evidence fell within the scope of the hearsay rule. It is trite that it is not all statements by non-witnesses which fall within its scope ... The interviewers' completed 'structured questionnaires' are really an integral part of this scientifically acceptable procedure which has been developed and refined to establish the truth as nearly as is statistically possible and it is in my view admissible as part of the whole." [100]

In Die Bergkelder v Delheim Wines (Pty) Ltd,[101] the Cape Provincial Division held that such evidence was hearsay and inadmissible. Counsel for the applicant contended that the answers of the interviewees were tendered, not as statements for the purpose of proving the truth of the contents thereof, but as facts from which the state of mind prevailing in the public could be inferred, and that they should therefore be admitted. Van Heerden J, however, rejected this argument on the ground that

> "the results of the market research in the present case are offered not merely as evidence of the existence of a public state of mind or opinion but as the truth of the facts contained in the unverified statements of persons not called as witnesses." [102]

The learned judge expressed total agreement with the contention that statements of non-witnesses may be admitted where the only issue is whether such statements had been made, and the veracity of the absent declarant is irrelevant, but added that the present case was not such a case. The evidence before the court clearly did depend for its value on the veracity of the declarant, and Van Heerden J recognized the hearsay dangers present in this evidence in the following observa-

tion:

> "The method of adducing evidence in the present case by blanking out the names of the interviewees has apart from any other valid objections there may be made it quite impossible for counter-proof to be offered without moreover any opportunity for cross-examination of the interviewees being available." [103]

The Rusmarc case was considered and Van Heerden J found himself in disagreement with the finding of Coetzee J:

> "Quite apart from an uncertainty in my mind as to the meaning to be ascribed as to the use of the words 'scientifically acceptable procedure' (ie acceptable by modern industry and commerce or in a court of law?) it seems that even as part of the res gestae the learned judge erred with respect in accepting that the whole procedure established the truth as nearly as statistically possible ...". [104]

These two cases illustrate well the anomalous consequences of applying the traditional formulation of hearsay to this type of situation : Coetzee J used the assertion-oriented 'truth of its content' style definition, and came to the inexorable conclusion that public opinion polls are not used to prove the truth of the assertions made by the interviewees. In reaching this conclusion, the learned judge was clearly correct, for the surveys were tendered not to prove the truth of what the interviewees stated, but to prove the reputation of the product inferentially from the state of mind of the public as a whole. Coetzee J therefore concluded that the evidence was non-hearsay and admissible.

Van Heerden J, on the other hand, recognized the hearsay-like quality of the evidence, and observed expressly that the procedural devices such as cross-examination were not available to test the dangers inherent in the statements of the interviewees. However, the learned judge, faced with the tradi-

tional definition of hearsay along assertion-oriented lines, then had the problem of making that definition fit the facts before him, and he concluded that the results of the market research were offered to prove the truth of the facts contained in their statements, which were therefore hearsay and inadmissible.

How much easier and less artificial it would have been to have employed the hearsay-danger approach along the lines of the declarant-oriented definitions. In fact, these two cases show clearly how dire is the need for the reform of the South African law of hearsay : The evidence of the results of public opinion polls is clearly hearsay, yet our definition of hearsay does not make this unequivocally apparent; the evidence nevertheless contains sufficient grounds for reception, yet our hearsay rule says it must be excluded, unless by chance there happens to be a recognized exception, by which the evidence may be "squeezed in through the back door." The fact that there is possibly an exception which could have been employed to admit the evidence (viz exceptions as to state of mind, or possibly the exception which allows evidence of the use of scientific instruments or measuring devices),[105] which was overlooked by the Courts on both occasions, bears further testimony to the unworkable and confusing state of our law on this topic.

Conclusion on State of Mind as a whole

The topic of "state of mind of the declarant" was introduced at this stage because of a criticism of Professor Tribe's

model levelled by R C Park.[106] The criticism was that this model cannot unreservedly be used to tackle the hearsay dilemma because it does not reflect majority doctrine, being (inter alia), inconsistent with many cases which consider "circumstantial evidence of a declarant's state of mind" nonhearsay. As a result of this criticism, it was convenient to consider at length the whole topic of evidence of state of mind, and from this discussion the following points have, it is submitted, emerged:

(1) The reservations expressed by Park are unfounded; where Tribe's model and decided cases have reached conflicting results, it is not the model which is at fault, but the decisions of the courts. The flaws in these decisions have their origin in one of the following sources:

   a. A failure on the part of the courts to identify a hearsay-situation or the presence of possible hearsay dangers.
   b. A recognition of such dangers, but an inflexible adherence to an assertion-oriented definition of hearsay, which may lead to anomalous and incorrect decisions because of the unsatisfactory formulation of the term 'hearsay' by the courts.
   c. A recognition of the need to admit certain evidence, which overshadows the recognition of the hearsay dangers present in such evidence, and which wrongly causes the courts to classify this evidence as non-hearsay for one of two reasons :

(i) the failure to recognize the existence of a recognized hearsay exception which would allow for its admission; or

(ii) the absence of a recognized hearsay exception, which forces the court to violate the tenets of logic and principle in order to admit valuable and reliable evidence.

The discrepancies, therefore, between case law and Tribe's model can be ascribed to either erroneous application of the law by the courts, or deficiencies in the law of hearsay evidence, which are notoriously profuse and ubiquitous. The value of the model in identifying these deficiencies and errors in fact underlines its worth and merit.

(2) The discussion of evidence of state of mind, besides illustrating the undoubted worth of Tribe's model, also served to raise some vital issues which will be encountered again in the discussion on implied assertions. These are :

a. that the present law regarding hearsay is in need of drastic re-appraisal and reform;

b. that the traditional assertion-oriented definitions of hearsay must be rejected in favour of the more workable declarant-oriented definitions; and

c. that the rule that excludes all hearsay (unless it can be admitted via one of the established exceptions) is incompatible with the variable nature of hearsay as envisaged in b. above, and must also be

rejected in favour of a more flexible approach which allows for a judicial discretion in deciding on the admissibility of hearsay.

Because these issues will form the subject of intensive discussion at a later stage,[107] consideration of these somewhat drastic conclusions will be left in temporary abeyance.

(B) Utterances which Explain certain Types of Conduct

Park's second objection to Tribe's model was that it was "inconsistent with the judicial tendency to designate utterances that explain certain types of conduct (such as the transfer of money), as nonhearsay 'verbal acts' even when the legal effect of the conduct varies with the subjective state of mind of the actor."[108] This criticism, as with that concerning evidence of 'circumstantial' state of mind, affords us an opportunity to examine not only the validity of the criticism itself, but also the respective merits of the different hearsay definitions in grappling with a topic which again lies in the twilight zone of hearsay, namely 'verbal acts' and 'verbal parts of acts'.

As was stated above, Mc Cormick, as well as many other authors, distinguish between verbal acts, which are utterances "to which the law attaches duties and liabilities"[109] without the need for any accompanying verbal conduct, and "verbal parts of acts", which are utterances that help to explain the significance of contemporaneous nonverbal conduct.

(a) Verbal Acts

The hearsay problem is not encountered at all here; if X says "Y is a bad doctor" or "I accept your offer", then, in an action against X for defamation or breach of contract, W is entitled to relate X's utterance to the court in evidence. As Mc Cormick points out,

> "When a suit is brought for breach of a written contract, it would not occur to anyone, when a writing is offered as evidence of the contract sued on, to suggest that it is hearsay." [110]

Why not? Clearly such evidence is not hearsay, but on what basis? It is not satisfactory to say that such evidence is not being offered to prove the truth of its content, because this is not always true. If W tells that X said "I accept your offer", then this is most certainly being tendered to establish that X did in fact accept the offer, the very fact asserted in X's utterance. The reason is that the credibility of the absent declarant (viz X) is not in issue, and the value of W's evidence is not diminished in the slightest degree by adverse information about X's veracity. The evidence is tendered merely to establish that X uttered certain words, viz "I accept your offer", and the mere utterance of these words is legally relevant, because according to the rules of offer and acceptance in the Law of Contract, such words are deemed to signify acceptance of an offer by the offeree. In other words, because the mere utterance of certain words creates certain legal consequences, the proof of the utterance of those words is relevant (in the legal sense), and because the purpose for which such evidence is tendered is merely to prove that such words were in fact spoken, the evidence is not hearsay.

Using Tribe's model, we can say that our conclusion C flows directly from the act A, without the need for a mental 'trip' via the belief B of our absent declarant X.

(b) Verbal Parts of Acts

According to McCormick, these constitute "explanatory words" which accompany and give character to the transaction",[111] and are non-hearsay. He provides the following examples: A conversation between the parties to an issue on whether a cashier made a loan for the bank or for himself;[112] on the issue of the validity of a mortgage, the mortgagor's statements that he wanted the property "plastered" so that his estranged wife could not "get her hooks into it"[113]; the statement of a depositor indicating lack of donative intent in establishing a joint bank account[114]; statements showing that a conveyance was in trust.[115]

However, as Park points out,[116] some of McCormick's examples rest on rather shaky ground; the statement of the mortgagor about wanting his property "plastered", for instance, has no independent legal significance and its value depends largely on the declarant's credibility. The problem, however, is that the difficulty of reconciling the nature of verbal acts and verbal parts of acts with hearsay theory has not usually been recognized. A notable exception to this tendency is the approach of Lempert and Saltzburg, who consider two separate examples in their analysis:[117]

(i) A depositor hands a teller $10 000, with a note that the money is to be placed in his child's trust account. This note would clearly be admissible evidence to

ascertain the intention of the depositor and to explain the act of handing over the money to the teller. The reason for this is that the conclusion is not dependent on the depositor's subjective state of mind, and therefore does not rest for its value on the depositor's credibility; he would be bound by the objective indications stated in the note, irrespective of what he thought he was doing.

(ii) X gives Y $20, and says, "Take this as a loan". The learned authors express the view that this evidence requires closer scrutiny: to conclude that X made a loan to Y, one needs to negate donative intent, and the only way one can do this by using X's statement is by relying on his credibility, i e, one has to rely on the belief of the absent declarant. However, because of the authors' definition of hearsay (viz. that an assertion is hearsay if and only if the inference sought to be drawn depends on affirmative answers to both what may be termed right and left leg questions) they conclude that such evidence still escapes the hearsay ban because no reliance need be placed on the 'right leg' dangers of faulty memory and perception.

What would then be our conclusion in relation to this type of evidence if we used Tribe's definition of hearsay, viz. that an assertion is hearsay if a trip from A to C necessitates a detour via B, or, put another way, evidence only escapes the hearsay ban if one can infer C directly from A? Would we be

forced to conclude therefore that evidence such as X's statement to Y above must be classified as hearsay? It is submitted that we would not; even though the requisite intent would have to be proved to establish that X made a loan to Y, this is not the only element that has to be proved. The objective fact that X made an offer to Y, accompanying the delivery of the money, would also be an essential element to be proved, and such a conclusion is inferred directly from the evidence in question. In other words, the mere utterance of the words "Take this as a loan", accompanying the act of handing over $20, objectively construed and independent of any subjective intent, has legal relevance to the issue before the court, and on that basis must be admissible as original evidence.

A similar problem is encountered by Park,[118] who considers the case where the declarant hands over money to another and uses words characterizing the transfer as a bribe, and his words are offered to show that he committed a crime. Park believes that this evidence should be classified as hearsay, as its value as evidence rests on the declarant's credibility because one element of the crime of bribery is subjective criminal intent. It is submitted, however, that to hold this view is to confuse the issues in question; it is not necessary that an extra-curial statement should, independent of the credibility of the declarant, support the very conclusion which is the subject of the trial; it is sufficient if it supports an inference which is itself legally relevant to the main issue. Words which are the subject of a defama-

tion action, for instance, are non-hearsay 'verbal acts'; yet one of the requirements for defamation in South African law is subjective intention to defame, or animus injuriandi.[119] Nevertheless the words of the defendant are clearly non-hearsay, because they are legally relevant to the issue in that they establish one of the essential elements of the action, namely the use by the defendant of prima facie defamatory words. Similarly, the use of words such as "Take this as a bribe" by the accused is itself legally relevant in a criminal trial for bribery, in that it establishes, without relying on the accused's credibility, one of the elements of the offence, viz. the actus reus or the criminal act.

From the above discussion, it is submitted that some significant conclusions can be drawn about the nature of 'verbal acts' and 'verbal parts of acts' and the relationship of such evidence to the hearsay rule: Take the instance where W says in evidence "X told me that he saw Y shoot Z". This evidence is capable of two uses:

(i) To establish that X can speak, in which case it is non-hearsay, as it does not rest at all for its value on the veracity of X.

(ii) To establish that X did in fact shoot Y, in which case it is hearsay, resting for its value on X's veracity.

Is it therefore correct to say that if W's evidence is used for the first purpose, it is always admissible? Say, for example, that W was testifying at a murder trial, at which Y was charged with the murder of Z; would this evidence in

its first, non-hearsay guise, be admissible? Clearly, in the absence of the rather unusual event of the court's having to inquire into X's powers of speech, such evidence would not be admissible, not because it is hearsay, but because it is not relevant.

This leads us to an important conclusion: All extra-curial statements or assertions are capable of two functions, a non-hearsay one (being the mere fact that certain words were spoken or a certain assertion was made) and a hearsay one (relating to the belief of the actor about such assertion, e g his belief in its truth, accuracy etc.). This would seem to indicate that all extra-curial statements or assertions should therefore be admissible, in their non-hearsay guise. Obviously this is not so, and the reason for this is that the rule excluding evidence which is not legally relevant would prevent the reception of at least some of these statements. Thus, for instance, it could be argued that the evidence excluded in Wright v doe d Tatham [120] could have been properly excluded on the basis that the letters gave rise to an inference of such tenuous probative force that they should have been excluded as being irrelevant.[121]

The hearsay rule, then, only makes sense when operating in conjunction with the rule relating to relevance, and nowhere is this more apparent than in the case of verbal acts and verbal parts of acts. Statements such as "X is a bad doctor" and "Take this as a bribe" (accompanying transfer of a sum of money), when tendered for the purposes mentioned

above, are non-hearsay and admissible as 'verbal acts' and 'verbal parts of acts' respectively, for two reasons:

1. They are tendered in their non-hearsay guise, their value being unaffected by any adverse information about the declarant's credibility or veracity; and

2. they are legally relevant, i.e. they are considered in law as containing a sufficient degree of probative value with regard to one of the issues which the court has to determine.

How then do we distinguish 'verbal acts' and 'verbal parts of acts' from other extra-curial assertions which in their non-hearsay guise are legally relevant and admissible? e g What is the difference between a statement such as "X is a bad doctor", tendered in a defamation action, and a statement such as "X told me he saw Y shoot Z" tendered in proceedings where one of the issues is whether X is capable of speech? The answer, it would seem, lies in the reason for the relevance of the statements. The latter statement is legally relevant because of its high probative value on a common sense basis of logic and experience, the normal criterion for determining legal relevance; the former, however, finds its legal relevance by virtue of the fact that it is 'legally operative' in terms of the rules of substantive law. In this particular case, the law relating to defamation considers such words as constituting prima facie evidence of a defamation; in the example "I accept your offer", it is the rules of contract which give the evidence its 'legally operative' quality.

With these concepts in mind, it is interesting to consider the trend in recent cases concerning verbal acts and verbal parts of acts. Park, after conducting a methodical computer-aided search of recent cases, came to the conclusion that the concepts 'verbal acts' and 'verbal parts of acts' are no longer applied to utterances which create gifts, loans, contracts, defamatory statements etc, apparently because "the absurdity of excluding such utterances is so obvious that there has been no occasion for appellate courts to write opinions explaining that statements of this kind are admissible."[122] Instead, the trend seems to have been to apply these terms to "language that is not legally operative, but merely explains the declarant's contemporaneous nonverbal conduct."[123] The problem is, says the learned author, that "[m]any of the utterances in these cases asserted the proposition to be proved, rested for value on the declarant's credibility, and did not fit under any established hearsay exception."[124]

Consider, for instance, the following cases:

United States v D'Amato[125]: In this case, X's statement that he was going to meet with his suppliers for purposes of obtaining heroin was admitted against Y to show that Y was one of the suppliers. The Court held that X's statement was a 'verbal act', which was defined as "contemporaneous utterances explaining nonverbal conduct or its tenor",[126] and admitted it on the basis that it 'explained' both X's conduct in getting into a car with Y and Y's conduct in taking evasive action when it was noticed that

they were being observed.

United States v Jackson[127]: Here an utterance by an unidentified declarant, who gave J heroin, that P would meet her to pick up quantities of heroin was held to be admissible against P as an utterance "contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light on it."[128]

United States v Manfredi[129]: The court in this case held that an utterance indicating that the declarant's uncle was the source of a certain supply of heroin was admissible against the uncle because it "shed light" on the declarant's conduct during his clandestine visit to his uncle.[130]

United States v Burke[131]: In this case the court invoked the concept 'verbal act' to admit a threat made by A that X would harm Y, where the utterance was offered against X to show his participation in an extortion scheme.[132]

From these cases, it can be seen that there is considerable merit in Park's criticism; in none of these cases does the utterance in question have value independent of the credibility of the declarant. The fact that the utterances 'explained' or 'shed light' on an act in question is no guarantee of reliability, for, as Park says, almost any utterance helps to explain some conduct or other. The result is that the expression 'verbal acts' has been used to give the courts, in effect, a discretionary means to avoid the exclusion of hearsay which they are able to employ without having to negotiate the dangers of hearsay or even having to search for an appropriate exception to the hear-

say rule.

A particular type of evidence which has given rise to much debate and controversy may conveniently be considered in this regard. These are statements made in connection with activities taking place on a certain premises, which are used to ascertain or prove the particular character of an activity carried on there. An example of such evidence has already been mentioned, viz where the police raid a suspected gambling house and intercept calls, during the course of which bets are placed and other gambling terminology is used. McCormick labels such evidence non-hearsay 'verbal parts of acts',[133] and indeed he finds support for this view in several cases, which will be discussed shortly.[134] Other writers, most notably Weinberg,[135] have categorized such evidence as implied hearsay assertions, again finding authority for this proposition. The confusion surrounding the nature of this type of evidence is symptomatic of the malaise afflicting our law of hearsay, and merits a thorough and critical comparative study:

1. Australia

As a general rule, this type of evidence is generally admitted in Australian Courts. The basis for its admission is, however, controversial, and a brief review of the case law will illustrate the problem of reconciling this approach with hearsay doctrine.

(a) Marsson v O'Sullivan[136] :

In this case, pursuant to a police visit to a suspected gambling establishment, policeman X answered the telephone

and heard the following statement : "Joe. 60s each way Lord Tanti, 5s top-weight next race Gawler." For the next hour, at intervals of only a minute or two, similar calls were answered by the police at the premises in question. Ligertwood J held that the evidence of the messages received by the police was admissible as "part of the res gestae as tending to establish the actual use to which the premises were put".[137] The learned judge found authority for this finding in the cases Bond v Berresford[138] and Lenthall v Mitchell[139], yet at no stage did he investigate the hearsay dangers possibly present, or whether the evidence should be admitted as original evidence or by way of a hearsay exception.

(b) Mc Gregor v Stokes[140] :

In this case, Herring CJ considered Wigmore's distinction between the testimonial or assertive use of human utterances and their non-testimonial use, and concluded that the evidence in question (viz of telephone calls intercepted by the police) fell into the latter category, in that they were non-hearsay 'verbal parts of acts.' In the words of the learned judge:

> "Now in the present case there was no question of using what the policeman heard 'testimonially' or 'assertively' ... Suppose one of the callers said 'This is Tom Jones. I live in Birdwood Avenue, Oakleigh. I want 10/- both ways on Roarer for the X.Y.Z. handicap' (a race run that day.). This statement would be put forward not to prove that the call was made by Tom Jones or that he lived in Birdwood Avenue, Oakleigh, but merely to explain the nature of the call and to prove that it was one that might properly be described as a 'betting' call, the call of someone seeking

> to bet with someone on the premises." (My italics.) [141]

With the greatest respect, it is submitted that this approach is erroneous : As was contended above, it serves no purpose to label an utterance a 'verbal part of an act' merely because that utterance 'explains the nature' of a particular act, because most statements in some way or other explain or shed light on some conduct which is relevant. The main consideration is whether the utterance, together with the act in question, has sufficient legal relevance independent of the value derived from relying on the declarant's credibility or veracity, an enquiry which was not conducted by the learned judge.

According to Weinberg,[142] the judgment of Herring CJ is deficient in that it fails to recognize that such utterances are tendered, not merely because they explain the act of calling, but further "because of an implied assertion on the part of the caller that he believes he is talking to a person who takes bets on horses". Weinberg submits that "[w]ithout that implied assertion the fact that the statement was made has no probative value".[143] Clearly there is considerable merit in the learned author's criticism; even if we adopt an assertion-oriented definition of hearsay, and exclude hearsay only if the evidence is tendered to prove the 'truth of its content', there would be a strong argument for labelling such evidence hearsay. Although the evidence is not tendered to establish the truth of any express assertion contained in the statement, it certainly <u>is</u> tendered to establish the belief of the declarant that

he is speaking to a gambling operator, an assertion implied in and wholly underlying the other assertions such as the declarant's name, address and amount bet on the race.

The need for this type of argument is, however, obviated if we employ a declarant-oriented definition of hearsay : The evidence in question requires the court to draw the following set of inferences:

I. The statement of the declarant such as the one referred to by the learned judge above.

⇒ II. The declarant believed that he was dealing with a gambling establishment.

⇒ III. The premises are used for gambling.

This is our standard hearsay-type situation, containing the normal hearsay dangers:

(i) Insincerity: The calls may have been made intentionally by an enemy of the owner of the shop who, knowing the police suspected him of running a gambling establishment, wished to incriminate him falsely.

(ii) Narrative ability: The words used by the declarant may not have reflected his true belief owing to, for instance, inadequacy of expression or, perhaps, his playing a joke.

(iii) Faulty perception: Perhaps the declarant had dialled a wrong number, or had erroneously thought the premises housed a gambling operation.

In the absence of the procedural devices to calculate the extent of these dangers and to minimize their effect, the

evidence must be considered hearsay.

Cross,[144] commenting on McGregor v Stokes supports the decision of the learned judge on the basis that "the callers were not seeking to convey information, but were uttering what are sometimes called 'operative words'; they were trying to make bets, not assertions." While this would be correct if the declarants were being charged with an offence such as 'attempted gambling' (if such offence were to exist), in which case the mere utterance of the words alone, without reference to the state of mind of the declarants, would be 'legally operative', this is not the case where the evidence is tendered to show the nature or character of the premises where the calls were received. In this case the words rest for value on the credibility of the absent declarants and cannot hide behind the convenient label of 'verbal parts of acts'.

(c) Marshall v Watt, Struthers and County[145]:

This case is one of the most interesting on this topic because of the conflicting approaches which emerged in the court a quo and the appeal court.

In the court a quo, Gibson J held that the evidence of the telephone calls should be categorized as hearsay and consequently rejected unless a suitable exception could be found for its admission. In coming to this conclusion, the learned judge considered and disagreed with the decisions in McGregor v Stokes and the New Zealand cases of Davidson v Quirke[146] and Quirke v Davidson.[147] In response to Herring CJ's view expressed in the passage above,

the learned judge stated the following :

> "I am unable to take that view of the evidence with which I am now concerned. What the respondent sought to establish against the appellants was that many people in a short period were trying to place bets with Watt. The truth of their statements that they wished to bet was a vital matter to the prosecution. It is true that the statement explained the purpose of the calls, but that does not transmute their essentially hearsay character into a colourless statement the truth of which is irrelevant to the issue. In fact the appellants' counsel complained vigorously that the reception of the evidence in this fashion precluded him from developing a defence based on the view that the alleged offers to bet were not genuine, but part of a plan to trap his clients." (My italics).[148]

With respect, it is submitted that this is one of the few judgments on this topic where the real issues, as they pertain to the essence of hearsay,have been clearly identified. As the learned judge points out, the fact that the statements "explained the purpose of the calls" cannot be allowed to overshadow their intrinsically hearsay nature. Being constrained to conceptualize hearsay within the bounds of the traditional assertion-oriented framework, Gibson J held the assertions to be hearsay because the truth of an implied assertion, viz the belief of their makers that they were placing bets with a gambling operator, formed the central focus of their probative value. Again, it is submitted that this conclusion is more simply and conveniently reached by using the declarant-oriented definition suggested by Tribe and others.

In the appeal to the Full Court, Crisp J (with Creen A-CJ concurring) overruled the decision of Gibson J and held the evidence to be admissible and non-hearsay. The reasons for this decision were two-fold:

(i) Crisp J felt that the previous decisions on this topic, mentioned above, should be followed to prevent "diversity in the common law", which the learned judge found to be "an evil" whose "avoidance is more desirable than a preservation here of what we regard as sounder principle." [149] (My italics.)

(ii) The learned judge[150] held the statements of the callers to be 'verbal acts' which could be proved to explain "the quality and intention" of their acts of calling the premises in question.

With the greatest respect, it is submitted that the view of Gibson J indeed represents "sounder principle", and it is difficult to appreciate what advantage is to be derived from the propagation of established law which is flawed and logically unjustifiable instead of allowing the law to develop along new avenues which are more in keeping with the dictates of reason, principle and logic.

2. New Zealand

The courts in New Zealand have taken a similar line to the Australian courts on this topic, and such evidence seems to be recognized as admissible. Whether it is allowed as original evidence or as an exception to the rule is, however, not clear.

(a) Davidson v Quirke[151] and Quirke v Davidson[152]:

In both cases, the evidence of thirteen telephone messages of a gambling nature was admitted, but the reason for its admission is a little obscure. In the former case,

Salmond J stated that

> "notwithstanding the general rule which excludes evidence of statements, the contents of those telephone messages as received and testified to by the police officers are legally admissible in evidence. This is an illustration of the principle that, notwithstanding the rule against hearsay, where the purpose or meaning of an act done is relevant, evidence of contemporaneous declarations accompanying and explaining the act is admissible in proof of such purpose or meaning." [153]

From this it is not clear whether the learned judge regarded the evidence as non-hearsay or as a hearsay exception, but Weinberg[154] is of the opinion that the word "notwithstanding" seems to suggest the latter, which substantiates the author's argument that non-assertive statements fall within the hearsay rule, but this is not completely clear from the learned judge's words.

It is interesting, however, to take note of a passage of Reed J in the latter case:

> "If only one or two of such messages had been received, the possibility that they had been sent owing to some error or mistake on the part of the sender would not be excluded, and therefore would have rendered evidence of such messages of little probative value; but where the evidence discloses that thirteen telephone messages were received within the space of under an hour and a half, each of such messages referring specifically to the same particular class of business, and couched in such terms as to show the utmost confidence that business would follow as of course upon the receipt of the message, error or mistake is not within the bounds of possibility." [155]

In this statement the learned judge identified the reasons for allowing this evidence: In his opinion the fact that there were many telephone calls was a factor which made the evidence sufficiently reliable; a single call would not

eliminate the possibility of mistake (eg the declarant could have dialled the wrong number), but thirteen calls were sufficient to eliminate this possibility. This observation is significant, as it shows an awareness by the court of the fact that hearsay dangers were present, and, although not thoroughly examined, there was an attempt to determine whether such dangers were reduced by the fact that not one but several calls to the same effect were made.

An important and interesting question arises for consideration from the tenor of the judgment in these two cases: what difference should the number of calls received make to the status of the evidence? Is it correct to say that evidence of, say, two calls is hearsay while evidence of, say, thirty calls is non-hearsay owing to the reduction of the hearsay dangers contained in that evidence? Certainly a cogent argument can be put forward for the reception of the latter class of evidence, where the hearsay dangers are so substantially reduced as to be virtually negligible. On the other hand, it is submitted that to label such evidence as non-hearsay would be misleading and incorrect. A distinction ought to be made between two types of admissible evidence: (i) out-of-court assertions which do <u>not</u> derive their value from the credibility of the absent declarant at all; and (ii) out-of-court assertions which <u>do</u> rest for value on the credibility of the absent declarant, but in respect of which there exist certain strong circumstantial guarantees of reliability.

An example of the first type of evidence is the statement of

an absent declarant, X, that he, X, saw Y shoot Z with a revolver, where the statement is tendered by a witness, W, in order to establish that X was capable of speech, or had knowledge of the alleged shooting. In this case the evidence does not depend on X's credibility for its value at all, as the relevant inference sought to be drawn is independent of his subjective belief. The hearsay dangers, therefore, do not arise at all.

An example of the second category would be where the same statement were tendered, but this time to prove that Y shot Z. Assume further that it is satisfactorily established that X had no motive to misrepresent (say, for instance, he would be seriously prejudiced by Y's implication in the crime), that X quite clearly intended to communicate this fact (say, for instance, W cross-examined him extensively on what he saw), and that there was no question about X's powers of memory or perception. Would this warrant labelling the evidence non-hearsay? It is immediately apparent that this category differs from the previous one in an important respect; whereas the hearsay dangers did not arise <u>at all</u> in category (i), the same is not true of category (ii). In order to draw the required inference, we <u>are</u> required to investigate the belief of the absent declarant, and it is only <u>after</u> this investigation has been conducted, and the hearsay dangers found to be satisfactorily accounted for, that an argument for admissibility can be presented. To call this evidence original, however, would take no account of the fact that the investigation of the hearsay dangers was carried out

by looking purely at circumstantial evidence and not by using the recognized courtroom procedures such as cross-examination, the oath etc to which oral testimony would have been subjected. The adversary, in other words, is denied his right of confrontation, which was identified earlier as one of the major reasons for the existence of the hearsay rule.[156] Category (ii), therefore, is sufficiently hearsay-like to resist the label 'original evidence', but may contain sufficient guarantees of reliability to warrant admissibility.

The fact, therefore, that thirty telephone calls were made, should not be allowed to detract from one's recognition of the hearsay-like quality of the evidence. On the other hand, it should also be realized that such evidence is less pregnant with hearsay-like dangers than evidence of two calls to the same effect, and the question of admissibility may well be resolved differently. This question, I submit, illustrates clearly the hazards of labelling evidence as either 'hearsay' or 'non-hearsay'. The identification of hearsay dangers merely states the problem of admissibility without solving it, and the factors which should be considered in determining admissibility will be considered later at greater length.

(b) The decisions in the above cases have subsequently been followed by the New Zealand courts in the cases Mathewson v Police[157] and Police v Machirus.[158] What is significant about these cases is that, unlike the cases discussed in (a) above, the courts here considered the admis-

sibility of only one or two telephone calls, and not several calls to the same effect. Yet in both cases the court concluded that this made no difference to the admissibility of the evidence. The reasoning of the court is succinctly summarized by Woodhouse J in Machirus' case:

> "Reed J expressed the view that one telephone call of the sort under consideration might not be admissible because of the risk of mistake. With respect, I do not think that objection goes to admissibility but ... simply to the probative value of the evidence." [159]

It is submitted that this illustrates the danger of using an assertion-oriented definition. Had the court employed a declarant-oriented definition, it would immediately have become apparent that the question of the possibility of error on the part of the declarant is in fact one of the hearsay dangers which forms part of the enquiry relating to admissibility. To relegate this enquiry to the question of the weight such evidence is to enjoy is, it is respectfully submitted, to misconstrue the operation of the exclusionary rule.

An interesting point to emerge from Machirus' case is the reasons advanced by the court for admitting the evidence: Richmond P admitted the evidence on the weight of authority without discussing the basis for such admission; Woodhouse J regarded the evidence to be non-hearsay, because the words used by the caller "were not tendered to prove the truth of any assertion but simply to indicate that there had been an apparent attempt to bet". [160] Cooke J, on the other hand, believed that the evidence should be allowed as an exception to the rule, saying:

> "[A] person's declaration of his contemporaneous state of mind - and a statement of his present intention must be within that category - is admissible as evidence of that state of mind. The principle is discussed in Cross on Evidence (2nd NZ ed), ... the author treating it as an exception to the hearsay rule, associated with the doctrine of res gestae." [161]

Thus, while it is clear that evidence of intercepted gambling calls is certainly admissible in New Zealand, little else on the topic can be said with any conviction. The uncertainty surrounding this topic is yet another legacy of the confusion surrounding the meaning of hearsay and the scope of the hearsay rule.

3. The United States

This topic has again received inconsistent treatment at the hands of the United States courts. The hearsay objection has, however, usually been unsuccessful, but the cases seem to indicate generally two different reasons for this conclusion.

(a) In People v Radley [162], the court held that such evidence could be received "not for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races."

This statement, which forms the basis of the approach in many other cases in the United States, [163] is of little assistance. As Weinberg observes, [164] "this rather neat statement over-simplifies many complex issues", and it seems clear that the court admitted the evidence as 'circumstantial evidence' which did not fall within the scope of the hearsay ban because it was not used to show the truth of

that which was asserted.

The flaws inherent in this type of reasoning have already been considered, and flow directly from reliance on the traditional assertion-oriented definition of hearsay.

(b) In State v Tolisano,[165] the court again admitted the evidence as non-hearsay, but adopted a different view of the nature of the evidence. According to Jennings J, the utterance "This is Al, Charlie; the Doc wants a $10.00 number hitch on eight races at Saratoga" was admissible, "not to establish the truth of the facts related in the telephone calls but to establish the calls as verbal acts to show that the defendant was engaged in the activities described in the information".[166]

As regards the nature of this testimony, the learned judge held that "[t]he evidence is admitted, not as an exception to the hearsay rule, but because it is not within the rule".[167]

What merit is there in the approaches laid down in Radley's and Tolisano's cases? Very little, it is submitted. As Weinberg says,[168] "[t]he problem with this approach is that the court fails to develop its inquiry into the reason for the attempt by the prosecution to introduce this evidence beyond very superficial analysis". The question which must be asked, and which the courts have seldom asked, is: Where does the evidence derive its probative value? The only probative value of such a telephone conversation is the inferred belief on the part of the caller that he was speaking to a betting house. At this stage, it is useful to

consider separately the results which flow from the two different definitions of hearsay:

(i) If one uses a declarant-oriented definition, it becomes readily apparent that such evidence is hearsay-like in character because of the need to investigate the belief of the declarant in order to reach the conclusion that the establishment is used for gambling.

(ii) If one uses an assertion-oriented definition, the result is less simple; because of the limitations of such definition, it makes little sense to talk of the "truth of the content" of the express assertion, when the express assertion, standing by itself, is irrelevant; the probative value of the statement lies in a derived 'implied assertion'. If one applies this definition instead to the implied assertion, then one reaches the conclusion that the evidence is hearsay. This method, however, is cumbersome, artificial and complex.

Some American cases have taken cognizance of the presence of the dangers in this type of testimony, although they are certainly in the minority.

I. In State v De Vincenti,[169] the court recognized that the probative value of such telephone calls lay in the belief of the caller. Although no clear analysis of the question was conducted, at least the court examined the purpose for which the evidence was tendered, and recognized the

hearsay-like quality of the evidence. The court accordingly classified the evidence as hearsay, and allowed it to be received by virtue of an exception relating to the res gestae doctrine.

II. The case of People v Barnhart [170] is significant for a dictum of Doran J in which the learned judge presented a dissenting view on the admissibility of this type of evidence. In one of the few instances where this topic has received the full judicial attention it deserves, the learned judge gave his opinion on the law in the following terms:

> "I know of no rule or principle of law that authorizes or justifies a relaxation of the hearsay rule for expediency. The evidence of the telephone conversations was pure hearsay. Evidence of the fact that a conversation was received would be admissible for the purpose of proving that the telephone was in order and functioning, but for no other purpose; the substance of the conversation is unnecessary for this purpose. The argument in People v Joffe ... namely that such evidence is admissible because 'it tended to establish the fact that the premises were occupied for the purpose of recording wagers on horse races', clearly permits a consideration of hearsay for the purpose of proving the very offense charged. And the same inaccurate reasoning appears in People v Reifenstuhl ... where the court declared, referring to such evidence, that 'It was not subject to the hearsay rule. The conversation was not admitted for the purpose of proving its own contents ... but to prove the use to which the telephone was subjected by the public and to demonstrate the reaction of the defendant at the time. The use of the room occupied by defendant was in issue and the nature of the telephone call was a circumstance to establish the truth ... '
>
> It is futile to argue that such evidence is not hearsay. In my judgment the preservation of the hearsay rule is not only important but vital in the administration of justice. To relax the rule just to uphold the conviction of a bookmaker, or for any other purpose, is nothing short of judicial stupidity." [171]

While this dictum perhaps goes a little too far - evidence of what the declarant said would be admissible where it does not rest for its value on the declarant's credibility - it nevertheless has considerable value in its plea for logical thought. At the same time, this passage reveals the full extent of the hearsay dilemma, viz, that doctrinal and logical soundness can only be achieved at great cost to pragmatism and the fluidity of the rules of evidence. If all evidence which was in effect hearsay-like were to be given the hearsay label, then the court would have to exclude what at times is the most reliable and valuable evidence at its disposal. The fault, as has been suggested before, lies not with a wide declarant-oriented definition of hearsay (which is necessary to alert the court to the possible dangers built into such evidence), but with the rule excluding all evidence bearing this label. To adhere rigidly to the rule and at the same time require practical decisions on admissibility can only result in the inexorable erosion of the definition of hearsay, and the widening of the gulf between hearsay doctrine and the tenets of logic and reason.

4. Canada

The attitude of the Canadian courts is represented by the decision of the Court of Appeal for Ontario in the case of R v Fialkow,[172] where McLennan J.A. stated the law as follows:

> "The evidence of the telephone calls is not hearsay. It is evidence of conduct or acts in the form of words. Those facts are carried out through the medium of the telephone which the appellant made available to those who performed

> them ... In this case the evidence is admissible to show the character of the business and not to prove the truth of what was said." [173]

This is, in effect, a paraphrase of the views expressed by the Australian and United States courts, and is again subject to the criticisms expressed above.

5. South Africa

The position in South Africa is reflected by the decision in the case of Lenssen v Rex, [174] the only case in our law dealing with this topic. This case differs slightly from those which we have encountered above in that it deals with the utterances of people made, not by telephone, but in the course of their conversations as they were entering and leaving the premises in question. These utterances were recorded by the police, who were watching the premises from a position near the entrance where they remained concealed. The statements of these people were presumably to the effect that gambling had taken place or was about to take place, (although the contents of the statements do not appear in the case report), and were tendered to establish that the premises were being illegally used for gambling purposes. In admitting this evidence, Smith J held as follows:

> "The expressions of people who went in and the expressions of those who came out seem to me to be applicable as part of the res gestae. Apart from that, it seems to me the evidence would be admissible on another ground, namely as to the intention with which the act of going in was done." [175]

It is difficult to ascertain, from the learned judge's remarks, whether the evidence was considered non-hearsay or admissible by virtue of an exception to the rule. Hoffmann

and Zeffertt[176] submit that it is possible that such statements may be regarded as implied assertions, which the authors consider should, in the circumstances of Lenssen's case, be admissible for reasons which will be considered later.[177] This view seems to suggest that the learned authors regard the evidence in Lenssen's case as hearsay but admissible by way of exception. With respect, and for reasons already expressed above, it is submitted that this is the better view.

Academic Commentary

Academic opinion on this point, although prolific, is no more consistent than the judicial authority, as can be seen by the following cursory examination.

(a) Morgan[178] emphasizes the fact that such evidence possesses distinct hearsay dangers. For instance, as the learned author points out,

> "It is quite possible, though perhaps highly improbable, that the speaker was using a code in some secret transaction other than gambling on the races ... and the remainder of the language may have been used for the express purpose of conveying a totally wrong impression to all interceptors."[179]

Even though such occurrences would perhaps be unlikely, the point the learned author makes is that without the opportunity for cross-examination it is not open for the accused to raise any arguments of this type. In the words of the learned author,

> "the fact remains that without the opportunity to examine the unknown speaker, the opponent had no way of exposing any artificialities or idiosyncracies in his use of words. Yet it would be

> an extremely rare case where either counsel or court would even notice, much less discuss, such a problem." [180]

(b) Maguire [181] also points out the dangers inherent in this type of evidence. If twelve callers telephone an establishment to place bets, and these calls are intercepted by a policeman, according to the learned author "it is conceivable that the voices he heard were those of twelve Sunday school superintendents, informed of the raid and consciously seeking to express the proposition: 'This telephone is regularly used for gambling purposes.'" [182] Because this proposition is so unlikely, however, Maguire expresses his approval of the courts' general tendency to admit this evidence. Thus, despite the hearsay-like nature of the evidence, its intrinsic reliability renders it "fortunate" in the author's opinion that the courts have regarded this evidence as non-hearsay.

(c) Weinstein [183] links the general admission of this type of evidence with the current tendency towards much freer admissibility of hearsay. This tendency has manifested itself in three ways, viz a tendency to narrow down the definition of hearsay, an expansion of the hearsay exceptions (especially by statute), and by a growing tendency "to admit hearsay where there can be no serious doubt of the credibility of the extra-judicial declarant - i e where probative force is high." [184] It is in the light of the latter tendency that Weinstein construes the decision in S v Tolisano [185] and other such cases. Although there were clearly

hearsay dangers in receiving this evidence, nevertheless, "in the light of the number of calls involved there was ample guaranty of trustworthiness." [186]

Although these tendencies are in his view generally necessary to escape the clutches of the over-rigid hearsay rule, the learned author does add a valuable warning, viz that "without frank recognition of the rapid change in our attitude towards the exclusionary rules, we abandon the possibility of providing reasonable procedural protections." [187] This warning warrants serious deliberation, and will be considered at length at a later stage.

(d) Falknor [188] also recognizes the hearsay-like quality of the evidence in these "betting cases". Remarking on the fact that the hearsay objection, although often raised in these cases, is invariably "brushed aside without adequate analysis of the problem", the learned author makes the important observation that the relevancy or probative value of such evidence depends "upon inferences from the conduct to the belief of the actor, to the truth of the fact believed - in other words, upon its use as an 'implied assertion' of the fact it was offered to prove". [189] This attitude is in keeping with the declarant-oriented approaches of Tribe and Lempert and Saltzburg, and, as has been submitted already on several occasions, reflects the superior view of the hearsay concept.

(e) Weinberg [190], as we have seen, also refers to the term "implied assertion" in his analysis of the evidence in

question. According to him, the courts have generally failed to appreciate the fact that the only value such evidence has is by way of an implied assertion, relating to the belief of the caller. In the process, the courts have "adopted a distorted analysis which involves labelling such statements as original evidence without considering whether the hearsay rule should be extended to them."[191] Once this fact is realized, says the learned author, it does not necessarily follow that the evidence must be excluded or even classified as hearsay, because this is an entirely distinct problem. What he objects to, however, is the fact that the courts have conducted the classification without a proper investigation or appreciation of the values and concepts involved.

At a later stage in his article,[192] the learned author, however, does commit himself as to the proper classification of implied assertions generally, and tenders the proposition that such evidence should be considered hearsay, but not necessarily excluded. A full consideration of this theory will be undertaken at a later stage of the discussion.[193]

(f) As opposed to the writers we have thus far considered, Ladd[194] fully endorses the view expressed by the court in Tolisano's case, saying that the court admitted the evidence "not to establish the truth of the facts heard over the telephone, but as evidence to show that the defendant was engaged in the activities described in the information."[195] And further:

> "While the telephone conversations might have been regarded as hearsay if the defendant had been charged with making bets, it was not hearsay on the issue of maintaining a place with apparatus for the purpose of making bets. The conversations were relevant to show that the room which the defendant occupied contained a device, namely the telephone, which was used, or kept for the purpose of use, in registering bets on horse races. The conversations provided first-hand information as to the use of the telephone and the other equipment in the room." [196]

It is interesting to note that Ladd would have considered the evidence hearsay if it were offered to prove that the defendant had been making bets, but non-hearsay for proving that he used a telephone for the purposes of registering bets on horse races. With respect, it is submitted that this distinction is artificial and illusory. The only basis for holding the evidence to be hearsay in the former case is by making use of a declarant-oriented definition or the device of "implied assertions", because it is the implied belief of the callers which points to the fact that bets are being placed at the premises of the defendant. However, using this chain of reasoning, it follows that the evidence in the latter case must also be hearsay, for its value is similarly dependent on the belief (or credibility) of the callers.

(g) McCormick,[197] as we have seen, is another proponent of the non-hearsay status of this class of evidence, classifying such utterances as 'verbal parts of acts' in that they indicate the character of an establishment, being "[e]xplanatory words which accompany and give character to the transaction". [198]

(h) Park,[199] however, comes out in strong criticism of McCormick's treatment of this category of evidence, adding that the learned author's approach is "questionable" and that "the basis for deeming these utterances nonhearsay is unexplained in McCormick and seems unjustifiable."[200] The reasons which Park advances for this criticism are as follows:

(i) Unlike the usual examples (which McCormick cites) of verbal parts of acts, the bookmaker calls "do not seem to be 'part' of an independently relevant 'act'".[201]

(ii) The utterances were not being used for what they did (i e subject the declarant to criminal liability), but to show what they expressly or impliedly said (i e that the addressee was a bookmaker). In other words, the utterances alone do not have any legal relevance and are not "legally operative".

(iii) If we admit this type of evidence as non-hearsay then, Park submits:

> "The category is broad enough to include conversations between customers in a tavern about prostitution on the premises, or gossip among guests at a party about the host's cache of drugs. Admission of this evidence in a prosecution of the tavern owner or the host would involve both use of utterances to show the truth of their assertions and reliance on the declarant's credibility."[202]

In other words, the admission of such evidence as non-hearsay would infringe both assertion- and declarant-oriented definitions of hearsay. In the bookmaker examples, however, although the 'verbal parts of acts' label is inap-

propriate, nevertheless a "respectable argument can be made that they are not hearsay under the assertion-oriented definition",[203] in that the statements are not offered to establish the truth of any assertion contained therein. (The learned author hastens to mention, however, the fact that such statements may still fall foul of an assertion-oriented definition by virtue of their being implied assertions.) In fact, says Park, there are good reasons why such calls should be admitted, because they are usually reliable, being corroborated normally by each other and by circumstantial evidence found on the premises. On the other hand, an equally strong argument can be made out that they <u>are</u> hearsay under the declarant-oriented definition, in that they depend for value on the declarant's credibility. Whereas the credibility dangers may be said to be reduced by the corroboration mentioned above, they are certainly not eliminated.

A vital point emerges from Park's discussion of bookmaker cases, a point which the learned writer emphasizes throughout the course of his very valuable article: It is an exercise in futility to attempt to categorize any type of evidence as hearsay or non-hearsay without first deciding which definition of hearsay you are to employ. Although in several instances the result will be the same for either definition, in many cases the results will differ. The evidence which we are at present considering. viz telephone calls to bookmakers, is one such example where the choice of definition is vital. Furthermore, on comparing the results of the two definitions in this instance, it is submitted that the declarant-oriented definition is greatly superior, alerting

the court to dangers which would otherwise go entirely unnoticed. It may appear that this would lead to unsatisfactory results, because of certain guarantees of reliability in some instances: this, however, is argument in favour of reform of the rule excluding hearsay, not argument on the definition of hearsay. The fact remains that the evidence in question rests for its value on the credibility of absent declarants, and thus, in terms of the rationale for excluding hearsay, falls squarely into the hearsay niche. Yet in the light of the massive weight of judicial authority to the contrary, the tentative criticisms of academic writers and the isolated dissents of judges such as Gibson J and Doran J seem like mere flickers of light in the gloom of the hearsay thicket.

NOTES TO CHAPTER IV

1 Wigmore Evidence I 3ed (1940) para 8c.

2 Rupert Cross "What should be done about the Rule Against Hearsay?" [1965] Criminal Law Review 68 at 82.

3 Edmund M Morgan "The Hearsay Rule" (1937) 12 Washington LR 1 at 12.

4 Laurence H Tribe "Triangulating Hearsay" (1974) 87 Harvard LR 957 at 957.

5 Phipson on Evidence 13ed (1982) 16-02 at 329-30.

6 [1965] AC 1001 at 1070.

7 [1956] 1 WLR 965 at 970.

8 1924 CPD 341 at 342.

9 1939 AD 106 at 119. See further S v Brumpton 1976 (3) SA 236 (T); S v De Conceicao 1978 (4) SA 186 (T); International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd 1953 (3) SA 343 (W); Rusmarc (SA) (Pty) Ltd v Hemdon Enterprises (Pty) Ltd 1975 (4) SA 626 (W); Monumental Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C); and Die Bergkelder v Delheim Wines (Pty) Ltd 1980 (3) SA 1171 (C).

10 John M Maguire "The Hearsay System: Around and Through the Thicket" (1961) 14 Vanderbilt LR 741 at 741.

11 Sir Rupert Cross Evidence 5ed (1979) 462.

12 Phipson on Evidence 13ed (1982) 16-02 at 329.

13 7th and subsequent editions.

14 Stephen Digest of the Law of Evidence article 15.

15 C T Mc Cormick Handbook of the Law of Evidence 2ed (1972) 584.

16 Jones on Evidence Civil and Criminal II 6ed (1972) by Spencer A Gard 159.

17 Tribe, op cit note 4, at 959.

18 R O Lempert and S A Saltzburg A Modern Approach to Evidence (1977) at 340-1.

19 Roger C Park "Mc Cormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers" (1981) 65 Minnesota LR 423 at 424.

20 Id at 424 et seq.

21 Mc Cormick, op cit note 15.

22 Park, op cit note 19, at 426.

23 Mc Cormick, op cit note 15, at 591.

24 Park, op cit note 19, at 427.

25 Mc Cormick, op cit note 15, at 593.

26 Park, op cit note 19, at 428.

27 19 N.W. 2d 529 (1945).

28 Mc Cormick, op cit note 15, at 592.

29 Park, op cit note 19, at 438.

30 Id at 445.

31 Id at 448-9.

32 Id at 450.

33 See Chapter V to VIII post.

34 (1837) 7 Ad & El 313; 112 ER 488.

35 See p 97 ante.

36 See further pp 253-267 post.

37 See p 94 ante.

38 See Chapter X post.

39 Park, op cit note 19, at 450; see particularly note 87.

40 See Fed R. Evid. 801 (a)-(c).

41 See L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) 115; see also Ex parte Currie and May NNO 1966 (2) SA 184 (R) and S v R 1965 (2) SA 463 (W).

42 See Hoffmann and Zeffertt, op cit note 41, at 115.

43 Wigmore Evidence VI (Chadbourne rev 1976) para 1725.

44 1924 CPD 341.

45 Id at 342-3.

46 Id at 343.

47 Ibid.

48 Ibid.

49 Id at 343-4.

50 1930 54 CCC 172.

51 Wigmore Evidence VI 3ed (1940) para 1790.

52 Supra note 50.

53 Stanley A Schiff Evidence in the Litigation Process I (1978) 267.

54 Ibid.

55 [1972] AC 378; [1971] 3 All ER 801.

56 [1972] AC 378 at 387; [1971] 3 All ER 801 at 805.

57 Schiff, op cit note 53, at 271.

58 See supra note 34.

59 [1972] AC 378 at 381.

60 L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) 114, paraphrasing the effect of Watermeyer J's comments in Estate De Wet v De Wet, supra note 44.

61 Supra note 50.

62 Supra note 55.

63 Supra note 34.

64 (1837) 7 Ad & El 313 at 388; 112 ER 488 at 516.

65 Supra note 44.

66 See Chapter X post.

67 Supra note 51.

68 Supra note 34.

69 See, for example, A Baily & Co Ltd v Clark, Son and Morland [1938] AC 557, where it was suggested by Lord Russell (at 574) that the correct procedure was to file affidavits sworn by some of those who had replied to questionnaires, and to file a further affidavit proving the number of persons who had replied, and by making the affidavits available to the other side.

70 Sir Rupert Cross Evidence 5ed (1979) 589.

71 [1969] RPC 418; [1970] RPC 339 (CA); [1972] 2 All ER 507 (HL), [1972] 1 WLR 729, [1973] RPC 297.

72 (1969) 4 DLR (3d) 289, 6 CRNS 353.

73 (1969) 4 DLR (3d) 289 at 294.

74 (1970) 1 CCC (2d) 251, 75 WWR 585.

75 (1970) 1 CCC (2d) 251 at 266.

76 Ibid.

77 [1970] 3 OR 688, (1971) 4 CCC (2d) 229.

78 (1971) 4 CCC (2d) 229 at 235-6.

79 (1971) 4 CCC (2d) 229 at 241.

80 See, however, Building Products Ltd v BP Canada Ltd (1961) 36 CPR 121, 21 Fox Pat C 130.

81 Schiff, op cit note 53, at 289.

82 Supra note 74.

83 [1972] 1 WWR 241.

84 Per Dickson JA in R v Prairie Schooner News Ltd (1970) 1 CCC (2d) 251 at 265.

85 See, for instance, Elgin National Watch Co v Elgin Clock Co 26 F. 2d 376 (1928); RCA v Decca Records Inc (SDNY 1943) (unreported); Proctor & Gamble Co v Sweet Laboratories Inc 53 USPQ 67 (1942). See also (1953) 66 Harvard LR 498 at 501.

86 See, for instance, People v Franklin National Bank 2000 Misc 557, 105 NYS 2d 81 (1951); S C Johnson & Son v Johnson 28 F. Supp. 744 (1939); United States v 88 Cases, More or Less, Containing Bireley's Orange Beverage 187 F. 2d 967 (1951); American Tobacco Co v Materezzo 2 USPQ 250 (1929); and Household Finance Corp v Federal Finance Corp 105 F. Supp. 164 (1952).

87 See Hans Zeisel "The Uniqueness of Survey Evidence" (1960) 45 Cornell LQ 322 at 333-4; and (1953) 66 Harvard LR 498 at 503.

88 105 NYS 2d 81 (1951) at 90-1.

89 Wigmore Evidence V 3ed (1940) paras 1420-3.

90 (1953) 66 Harvard LR 498 at 503.

91 Robert C Sorensen and Theodore C Sorensen "The Admissibility and Use of Opinion Research Evidence" (1953) 28 New York University LR 1213.

92 Id at 1232.

93 Ibid.

94 [1976] 1 NZLR 36.

95 Op cit note 91.

96 [1976] 1 NZLR 36 at 42.

97 Ibid.

98 1975 (4) SA 626 (W).

99 At 630.

100 At 630-1.

101 1980 (3) SA 1171 (C).

102 At 1181.

103 At 1182.

104 Ibid.

105 See 1975 Annual Survey of South African Law 499. See also S v Mthimkulu 1975 (4) SA 759 (A) and Wigmore Evidence II 3ed (1940) para 665a as to the ambit of these exceptions.

106 See p 116 ante.

107 See Chapter X post.

108 Park, op cit note 19, at 450.

109 Mc Cormick, op cit note 15, at 588.

110 Ibid.

111 Id at 589.

112 See National Bank of the Metropolis v Kennedy 84 U.S. (17 Wall.) 19, 21 L.Ed 554 (1873).

113 Barnett v Hitching Post Lodge, Inc 421 P. 2d 507 (1967).

114 In re Cronholm's Estate 186 N.E. 2d 534 (1962).

115 Butler v Butler 114 N.W. 2d 595 (1962).

116 Park, op cit note 19, at 444.

117 Lempert and Saltzburg, op cit note 18, at 342-3.

118 Park, op cit note 19, at 443.

119 See Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 (3) SA 394 (A) and Borgin v De Villiers 1980 (3) SA 556 (A).

120 Supra note 34.

121 See L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) 106, note 17.

122 Park, op cit note 19, at 448.

123 Ibid.

124 Ibid.

125 493 F. 2d 359 (1974).

126 Id at 363

127 588 F. 2d 1046.

128 At 1049-50.

129 488 F. 2d 588 (1973).

130 At 596.

131 495 F. 2d 1226 (1974).

132 At 1231-2.

133 Mc Cormick, op cit note 15, at 589, esp. note 81.

134 See pp 179-181 post.

135 Mark Weinberg "Implied Assertions and the Scope of the Hearsay Rule" (1973) 9 Melbourne University LR 268 at 274-7.

136 [1951] SASR 244.

137 At 248.

138 [1931] SASR 285.

139 [1933] SASR 231.

140 [1952] VLR 347; (1952) ALR 565.

141 (1952) ALR 565 at 568.

142 Weinberg, op cit note 135, at 276.

143 Ibid.

144 Rubert Cross "The Periphery of Hearsay" (1969) 7 Melbourne University LR 1 at 13.

145 [1953] Tas SR 1.

146 (1923) NZLR 552.

147 (1923) NZLR 546.

148 [1953] Tas SR 1 at 5.

149 At 15-16.

150 At 17.

151 Supra note 146.

152 Supra note 147.

153 (1923) NZLR 552 at 556.

154 Weinberg, op cit at note 135, at 276.

155 (1923) NZLR 546 at 551. See also a similar statement by Salmond J in Davidson v Quirke (1923) NZLR 552 at 555.

156 See p 44 ante.

157 [1969] NZLR 218.

158 [1977] 1 NZLR 288.

159 At 292.

160 Ibid.

161 At 294.

162 157 P. 2d 426 (1925), at 427.

163 See, for instance, People v Joffe 113 P. 2d 901; People v Reifenstuhl 99 P. 2d 564; and S v Rhoten 257 P. 2d 141.

164 Weinberg, op cit note 135, at 274.

165 70 A. 2d 118 (1949); 13 ALR 2d 1405 (1949).

166 13 ALR 2d 1405 (1949) at 1408.

167 Ibid.

168 Weinberg, op cit note 135, at 274.

169 93 So. 2d 670 (1957).

170 153 P. 2d 214 (1944).

171 At 219.

172 (1963) 2 CCC 42; 40 CR 151.

173 Ibid.

174 1906 TS 154.

175 At 156.

176 L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) at 111.

177 See p 307 post.

178 Edmund M Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harvard LR 177 at 198-9.

179 Id at 198.

180 Id at 198-9.

181 John M Maguire "The Hearsay System: Around and Through the Thicket" (1961) 14 Vanderbilt LR 741 at 767.

182 Ibid.

183 Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 342-3.

184 Id at 342.

185 Supra note 165.

186 Weinstein, op cit note 183, at 343.

187 Id at 342.

188 Judson F Falknor "The Hearsay Rule and its Exceptions" (1954) 2 UCLA LR 43 at 46-7.

189 Id at 47.

190 Weinberg, op cit note 135.

191 Id at 277.

192 Id at 292-3.

193 See pp 323 to 351 post.

194 Mason Ladd "The Hearsay We Admit" (1952) 5 Oklahoma LR 271.

195 Id at 275.

196 Ibid.

197 Mc Cormick op cit note 15.

198 Id at 589.

199 Park, op cit note 19.

200 Id at 446-7.

201 Id at 446.

202 Id at 447.

203 Id at 445.

Chapter V

STATEMENT AND ORIGIN OF THE PROBLEM OF IMPLIED ASSERTIONS: WRIGHT v DOE d TATHAM

In the course of the previous chapter, an attempt was made to define 'hearsay', and to confine the concept within fixed and ascertainable parameters. This attempt, as has been illustrated, met with major obstacles: First, the term hearsay has nowhere received comprehensive judicial attention as regards its definition and ambit. Out of the various proposals to define the concept, two main approaches are discernible, viz the assertion- and declarant-oriented definitions. The assertion-oriented approach, while offering the questionable advantage of limiting the impact of the hearsay rule within fixed and fairly rigid confines, is unsound, it is submitted, in principle and logic, and may lead to anomaly and, sometimes, to irreconcilable consequences. The declarant-oriented definition, while it may be theoretically appealing because of its intrinsic doctrinal elegance, poses practical problems in that it renders the ambit of hearsay very wide. Acceptance of the latter theory would necessitate a reformulation of the hearsay rule, an ineluctable conclusion from any probing of topics such as, for instance, 'circumstantial evidence of state of mind' or 'verbal acts' and 'verbal parts of acts'. These topics lie in the twilight zone of hearsay, and, in classifying such evidence, different results ensue depending on which of the two approaches is employed. These topics were examined in some depth, and out of this examination the following conclusions may be drawn:

(1) The declarant-oriented definition is a superior tool for analysing the hearsay concept, largely because the scope of such definition is congruent with the rationale underlying the hearsay rule.

(2) The results derived from employing this type of definition do not always correspond with the decisions of the majority of the courts; however, where there is such disparity, it can be shown that it is not the fault of the definition, but rather the justifiable reluctance of the courts to exclude all hearsay-like evidence. It is therefore the rule requiring the exclusion of all hearsay which causes this disharmony.

(3) The acceptance of a declarant-oriented definition would therefore require the re-appraisal and reform of the hearsay rule, a proposition which will be considered at length later.

(4) If it is accepted that the declarant-oriented definition is better equipped to deal with topics on the border of hearsay, then the following definition of hearsay may tentatively be put forward: an extra-curial assertion that derives its probative value from the credibility of its maker.

(5) However, one further question remains to be answered; what is meant by an 'assertion'? Does this include conduct or non-conduct (silence)? Furthermore, what about statements or conduct which are not intended by their maker to communicate any idea or message - do these fall within the ambit of these 'assertions'?

(6) This latter problem brings us on to the topic of implied

assertions, a question which has vexed and challenged commentators on the law of evidence since the seminal and far-reaching decision in Wright v Doe d Tatham [1] in 1837. However, before embarking on an analysis of this concept, it is worth making a note of the context in which this problem has arisen; it requires special attention in relation to one particular element of our hearsay definition and that element alone, viz 'assertion'. Thus, throughout the rest of the discussion, it must be remembered that the remainder of the definition remains unaltered. Put in another way, the aim of what follows is to answer a single question: Must the term 'hearsay' be defined to include or to exclude implied assertions that rest for their value on the credibility of an absent declarant? To omit the italicized portion of the enquiry would be to mis-state the problem, for if the circumstances are such that an implied assertion does not rest on the credibility of the declarant for its evidential value, then the evidence is clearly non-hearsay. But then an express assertion to the same effect would also be non-hearsay, and we have not progressed in our analysis at all.

The Origin of the Problem: Wright v Doe d Tatham

This famous case concerned the testamentary capacity of a certain John Marsden, who had in his will bequeathed a substantial part of his considerable estate to his steward, Wright. The background of this memorable case is pictu-

resquely and amusingly set out by Maguire in the following manner:

> "[Marsden] was a mild, polite, shrinking, shortish man, not bad-looking and with 'fresh colour,' rather afraid of dogs, big or little, at ground level and of horses when he attained the elevation of the saddle. Although friendly and hospitable, he did not carve well enough to meet the demands of a table at which many were habitually served. So myopic that he could not recognize people even a few yards away, he had a habit of contracting his brows and distorting his face to overcome the visual difficulty. He was quite uneducated, entirely unmarried, and sometimes bumbling in the presence of ladies. The ringing of bells fascinated him; so did check aprons worn by the servant maids. He took an interest in music, but the variety of his performance and tastes was too limited to give others much joy. He did become well-informed and competent as a genealogist, having a tenacious memory; and was also something of a drum-and-trumpet military historian. His religion and politics were conservative.
>
> Riding grandly by carriage, he led his freemen to the polls on election days. Indecisive, slow of perception, submissive, and indolent, he relied much upon his steward Wright, a positive and unlovable man who, as a principal testamentary beneficiary, became a target of attack in the court proceedings. Since, by the early death of his elder brother, Mr. Marsden inherited substantial properties, in one way or another he was drawn into many acquisitive dealings. All in all, it was not too surprising that his cousin and sole heir-at-law Admiral Tatham should promptly, vigorously, and tenaciously have attacked the validity of the testamentary dispositions." [2]

In attacking Marsden's capacity, evidence was admitted

> "that Marsden was treated as a child by his own menial servants; that, in his youth, he was called, in the village where he lived, 'Silly Jack' and 'Silly Marsden' ... ; that a witness had seen boys shouting at him, 'There goes crazy Marsden', and throwing dirt at him, and had persuaded a person passing by to see him home." [3]

This evidence was received without complaint. However, evidence was also adduced of three letters addressed and sent

to Marsden, all from persons since dead, which had been discovered after Marsden's death in a cupboard under a book-case in the library at Marsden's residence. The seals of the letters had been broken, and the envelopes had apparently been opened. The contents of these letters were as follows:

I. From CHARLES TATHAM, Mr. Marsden's cousin, who, at the time of writing, was in America. [4]

"My Dear Cousin. - You should have been the first person in the world I would have wrote to had nt. my time been Imployd by affairs that called for my more imeadeate atention in the first place I am calld upon by my Buseness it being the first consideration must by no means be neglected. As for my Brother his goodness is Such that I know he will Excuse me till I am more disengaged was I to write to him in my present Embarased situation I might perhaps only do justice to my own feelings & he might construe it deceit (so different an opinion have I of him to Mankind in Genl. who above all things are fond of Flattery. I shall now proceed to give you a small Idea of what has passd. since my Departiure from Whitehaven as I supose Harry long ere now has told you the rest. We saild the 14th. July & had Good Weather the Chief of the Way [318] but as you know nothing of Sea fareing matters it is not worth While to Dwell upon the Subject. We Reachd. the Cape of Verginia the 13th. Septr. but did not get heare till the begining of the present Month so we were about twenty Days in coming 350 Miles. When I arivd. I was no little consirned to find the Town in a Most Shocking Condition the People Dieing from 5 to 10 per day & scarsely a Single House in Town cleare of Descease which proves to be the Putrid Fevour - I am going to Philadilphia in a few days if God Spares my Life and permits me my Health & their I intend to stay till Affairs here bare a more friendly Aspect & so the Next time you here from me will be I expect from that Place tho' Youl Please to direct to me heare as Usual. God Bless You my Dear Cousin and may You still be Blessd with health which is one of the greatest Blessings we require hear is the sinseare wish of Dr Cosn. Your Affect. Kinsman & verry Humble Servt.
Cha. Tatham.
P.S. Pray give my kind Love to my Aunt My Brother & My Cousin Betty allso my Complements to all the rest of the Family and all others my former Aquintances, &c.

Alexandria, 12th Octr. 1784."

Addressed 'John Marsden Esquire Wennington Hall, Lancaster.'

II. From the Rev. OLIVER MARTON, Vicar of Lancaster.[5]

"Dear Sir, - I beg that you will Order your Attorney to Wait on Mr. Atkinson, or Mr. Watkinson, & propose some Terms of Agreement between You and the Parish or Township or disagreeable things must unavoidably happen. I recommend that a Case should be settled [319] by Your and their Attorneys, and laid before Councill to whose Opinion both Sides should submit otherwise it will be attended with much Trouble and Expence to both Parties. - I am, Sr. with compliments to Mrs. Coockson, Your Humble Servant, &c.
"Oliver Marton.
"May ye 20th 1786
"I beg the favour of an Answer to this.
"John Marsden, Esq. Wennington."

III. From the Rev. HENRY ELLERSHAW, on resigning the perpetual curacy of Hornby, to which Mr. Marsden had appointed him.[6]

"Dear Sir, - I should ill discharge the obligation I feel myself under, if, in relinquishing Hornby, I did not offer you my most grateful acknowledgements for the abundant favours of your Hospitality and Beneficence. Gratitude is all that I am able to give you, and I am happily confident that it is all that you expect; I have only therefore to assure you, that no Circumstances in this World will ever obliterate from my Heart and Soul the remembrance of your benevolent Politeness. May the good Almighty long bless you with Health and Happiness, and when his Providence shall terminate your Xtian Warfare upon Earth, may the Angels of the Lord welcome you into Blessedness everlasting. It will afford me pleasure to continue my Services during the Vacancy, if agreeable to you. With every sentiment of Respect and Affection to yourself and the worthy family at the Castle, I hope you will ever find me, Your grateful, faithful & obliged Servt.
"Henry Ellershaw.
"Chapel le dale.
"3d Oct: 1799 - Please to deliver the Inclosed to Mr Wright."

All these letters were thus related to subject matters and written in language appropriate to communications with a person having reasonable intelligence. The letters were tendered, not to prove the truth of any portion of their actual express

contents, but to show the belief of the writers that Marsden possessed adequate understanding, and therefore that he did in fact enjoy such understanding. The controversy surrounding the admissibility of this evidence raged for many years, and in the process elicited opinions from 17 judges. The King's Bench finally decided that the admission of this evidence was error, and a new trial was ordered. At the new trial, the evidence was rejected, and the verdict was against the validity of the will. On error to the Exchequer Chamber, the ruling of exclusion was affirmed, after the question had been argued twice by most learned counsel. Because this decision represents one of the very few instances where the courts have investigated the problem of implied hearsay assertions at any length without evading the issue, this case warrants intensive examination.

It is interesting first to look at the arguments of counsel before the Exchequer Chamber, especially in view of the justifiable reputations of such counsel, described by Maguire as a 'glittering array'.[7]

1. Sir F Pollock (arguing in favour of admission of the letters) : Three main arguments were advanced in favour of admissibility:

(a) The question being as to the mental capacity of the testator, all letters addressed to him by persons proved to have known him were evidence as showing the treatment of him in society. To support this argument, the following illustrations were given:

> "Suppose a testator were proved to have received a great number of letters from learned and intelligent persons, consulting him on points of science or policy; that those persons were shewn to have been well acquainted with him, and, in some instances, to have written to him repeatedly on the same subjects; can it be said that the sending of such letters, even though not proved to have been acknowledged or acted upon, would, in the ordinary course of life, produce no effect on a reasonable mind? ... If letters had been written to him in a foreign language, with an apparent view to correspondence, by a person who knew him, would no inference arise as to his knowledge of the language? The present evidence is precisely the same in character, though perhaps not calculated to produce so strong an effect." [8]

(b) The second letter, written by Oliver Marton, requesting Marsden to direct his attorney to propose terms of agreement with the parish, is an act done and part of the res gestae in the case. This is similar, argued Pollock, to the type of case where to establish the price of certain goods at an auction sale, an auctioneer may testify as to the amount bid. Similarly, also, if an eminent lawyer had written to Marsden to become a trustee, then the letter would be admissible.

(c) In terms of the judgment of the King's Bench, it was admitted that "without dispute, any, the least, act done by the testator with reference to the letters would have made them evidence." Pollock argued that such acts were in fact done by the testator in this case: the letters had been found in a repository with the seals broken, together with other letters which he had in fact answered; the reasonable conclusion must therefore be that Marsden had opened and read the letters. The hearsay objection cannot apply to

letters acted upon, and thus the letters should be received in evidence.

2. Cresswell (arguing against admission) : Cresswell's argument revolved largely around two central themes:

(a) The letters cannot be admitted because they represent the opinions of persons who cannot be called as witnesses, whose statements cannot be verified by oath and subjected to the test of cross-examination. The reception of this evidence is thus dangerous, in that the statements made to Marsden may have been made ironically or insincerely, and even if this may not be presumed in the present case, the point is that the motives of the writers cannot be ascertained by cross-examination, whereas if they had testified personally they could.

Cresswell criticized the examples given by Pollock concerning letters from scientists etc., remarking that the mere fact that a scientist sends a letter in scientific terminology to X does not prove that X understood the most abstruse points in it, or even that he was conversant with science. The scientist would be required to testify on oath and subject to the test of cross-examination as to the basis of his opinions. The same criticisms apply to establishing that the authors believed Marsden to be sane.

(b) The letters cannot be considered part of the res gestae,

said Cresswell, because "the fact which it is attempted to prove, however disguised in argument, is not a thing done, but that Charles Tatham, Marton, and Ellershaw thought Marsden capable of understanding their letters; and that is not a conclusion legally drawn and established by competent means." [9]

3. Starkie (also arguing against admission of the letters):

(a) The evidence in question is one of opinion and judgment, and the author must therefore be cross-examined as to the means he had of forming a judgment, and the diligence and good faith with which they were applied. Here no such test can be applied. Although it is argued that in the present case the writers knew Marsden, this is not sufficient, as the admissibility of hearsay evidence is decided by "general tests, not by particular and casual ones arising in the individual case." [10]

(b) To argue that the letters could be used to prove the fact that Marsden was treated by the authors as being sane and capable of reasoned thought is also not helpful; they prove at most that the authors thought him so capable, not that he was so capable. Similarly, letters to a testator on scientific subjects could have proved only that the writers thought him able to understand them.

(c) It was argued for the plaintiff in error that the letters could be admitted as explaining acts done by

the testator, viz the opening and reading and comprehension of the letters, together with the probable dispatch of Marson's letter to Barrow (as indicated by Barrow's endorsement thereon). However, this argument 'turns in a circle', as it rests upon the assumption that the testator read and understood the letters - the ordinary reactions of a reasonably intelligent man - in order to prove the very fact that Marsden was reasonably sensible. This argument must accordingly be rejected.

The judges of the Exchequer Chamber were divided in their opinion, and it is worthwhile to examine individually their judgments on the admissibility of the letters:

1. Coltman J held that the evidence should be rejected. He divided the enquiry into two stages:

(a) Would such letters be admissible if never received (and thus never reacted to) by the addressee? The answer to this, said the learned judge, must be in the negative, for the following reasons:

(i) The letters contain expressions of opinion and judgment, and this may only be proved by the examination of witnesses on oath. The oath furnishes some guarantee of sincerity, while cross-examination allows one to test the foundation and value of the opinion.

(ii) It cannot be argued that the writing of the letters, being an act done, renders admissible the

contents thereof as a declaration accompanying an act, as:

> "I am not aware of any case, where the act done is, in its own nature, irrelevant to the issue, and where the declaration per se is inadmissible, in which it has been held that the union of the two has rendered them admissible." [11]

Therefore, the act of writing a letter to Marsden being irrelevant to the issue of his capacity to make a will, the contents of the letter must also be inadmissible.

(b) Is there sufficient evidence to show that the testator had done any act with respect to the letters, thus making the letters admissible to explain the nature of the act done and thus his mental capacity? The learned judge found that there was not; it would be arguing in a circle to accept plaintiff's argument that the letters, having been found with the seals broken, must be assumed to have been read.

2. Bosanquet J came to the same conclusion as Coltman J, expressing similar views on the requirements of the oath and cross-examination to test the possible hearsay dangers latent in the evidence. These dangers were recognized and described in the following passage:

> "It is obvious that the contents of the letters may be dictated by various motives, according to the dispositions and circumstances of the writers. Language of affection, of respect, of rational or amusing information, may be addressed from the best of motives to persons in a state of considerable imbecility, or labouring under the strangest delusions. The habitual treatment of deranged persons as rational is one mode of promoting their

> recovery. A tone of insult or derision may be employed in a moment of irritation in writing to a person in full possession of his reason; what judgment can be formed of the intention of the writers, without an endless examination into the circumstances which may have influenced them?" [12]

3. Parke B, in perhaps the most memorable judgment on the question of implied assertions, was also of the opinion that the evidence should be excluded.

The learned judge considered separately the two main grounds advanced for the admission of the three letters:

(a) That there was sufficient evidence of an act done by the testator to render the contents of the letters admissible by way of explaining that act. This argument was quickly disposed of, for the same reasons as those laid down by Coltman J:

> "[I]t assumes the testator to be competent, in order to raise the inference that he was cognisant of the contents of the letters, and then makes use of the presumed cognisance of the contents of the letters to prove that he was competent." [13]

(b) That the letters were evidence of the treatment of the testator as a competent person by individuals acquainted with his habits and personal character: No doubt, said Parke B, the letters indicate that in the opinion of the writers Marsden was a rational person, and if those writers had been living and had testified as to this opinion, then such testimony would have been admissible. However, this was not the case, with the result that

> "those letters may be considered in this respect

> to be on the same footing as if they had contained a direct and positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question, with this addition, that they have acted upon the statements on the faith of their being true, by their sending the letters to the testator." [14]

To allow the admission of such evidence, said the learned judge, would lead to the "indiscriminate admission of hearsay evidence of all manner of facts". As a result, a large category of evidence which appears to be evidence of mere fact is in fact inadmissible hearsay evidence, open to the same objections as the present evidence. Examples of this class, he continued, are as follows: The conduct of the family of a testator in taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible position; the conduct of a doctor who permitted a will to be executed by a sick testator; on a question of seaworthiness of a vessel, the conduct of a deceased captain, who, after examining every part of the vessel, embarked on it with his family.

The learned judge's concluding statement is now one of the most oft-quoted on this topic:

> "The conclusion at which I have arrived is that proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible; and, therefore, in this case the letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible." [15]

4. Tindal CJ, on the point of whether the letters were admissible as regards the proof of their contents, shared similar sentiments. Such contents, said the learned Chief Justice,

> "can amount to no more than an expression of the opinion of the speaker, or the writer, or the actor, and ... such opinion, not having been given upon oath, and not being subject to cross-examination as to the grounds upon which it was originally formed or continued, cannot, upon that account, be deemed admissible in evidence." [16]

However, the learned Chief Justice held that one of the letters, viz that sent by Marton, should be admissible, not to establish the fact that Marton treated Marsden as having reasonable mental capacity, but to explain the subsequent conduct of Marsden after receipt of the letter. In the opinion of Tindal CJ, there was sufficient evidence to show that the letter had come to the testator's knowledge, and that he had "exercised so much understanding upon it as was sufficient to have authorised its admission to the jury". [17] There was insufficient evidence of such acts as regards the other two letters, which were held to be inadmissible.

5. Gurney B held that all three letters should be admitted, applying largely the same argument as that employed by Tindal CJ, but extending it to all the letters. In the learned judge's opinion, there was sufficient evidence of acts done by Marsden in respect of all three letters to warrant their reception. Rejecting the contention that such argument turns in a circle, he said that he did not see "that it is forming any presumption of his competency to assume that the seals

had been broken, and the letters read by him".[18]

6. Park J, agreeing that all three letters should be admitted, employed the following tentative argument, admitting nevertheless "great doubt about the validity of my own opinion":

> "It seems to me impossible to suppose that persons of character and intelligence, who were well acquainted with him, wrote such letters to him as they would not have addressed to any but a person whom they supposed to be of sound mind, and this covering the period in which he is said to be unfit for associating with the general class of men with whom his station in life would otherwise entitle him to associate".[19]

In respect of Ellershaw's letter, he remarked:

> "I will not believe that any man of that sacred function could write such a letter, expressive of such sentiments of piety and benevolence of the person to whom it was addressed, by one who for years had been his spiritual pastor and guide, and who being about to quit, or having actually quitted, his charge, must have been the vilest hypocrite to write such a letter, without one secular motive to serve in doing so."[20]

Referring to Rev Marton's letter, he added:

> "He was vicar of Lancaster; the last man in the world to write, we should suppose, to an idiot; and he writes a letter and sends it to Mr Marsden upon business, and upon business merely ... "[21]

Furthermore, said the learned judge, there was sufficient evidence of acts done by the testator to justify the admission of the letters to explain such acts. The inescapable inference is that the letters had been "read and laid by"; an idiot would not have done this, but would instead have "thrown them aside".[22]

Academic Commentary on Wright v Tatham

Academic commentary on this famous old case has been fairly profuse. One of the most ardent opponents of the decision is John M Maguire, who lamented the waste of "what might have been an almost miraculously appointed opportunity for authoritative determination of the claim that where there is no intentional communication of the proposition at issue, where that proposition is come at only by inference, there can be no hearsay." [23] The time, submits the learned author, seemed apt to restrict the scope of the exclusionary rule, but the prevailing legal climate was to prove too rigid for such change, the case being decided in "an era of somewhat pompous professional satisfaction as to the technical English rules of proof at common law." [24] Another stumbling block was the fact that the evidence in question involved the opinions of the authors of the three letters, and when "hearsay gets compounded with opinion, its admissibility is doubly unlikely". [25] The ultimate result, says Maguire, was a "confused miscellany of opinions, doing little to clarify the concept of hearsay or helpfully to free any broad category of evidence from its shackles." [26]

Despite this strong criticism of the case, Maguire nevertheless makes what he calls "useful commentary" on several aspects of the decision:

1. He points out that while the three letters in question were excluded, many letters which were sent to Marsden and upon which he acted in the course of a "voluminous correspondence" were admitted without question. The letters to

Marsden were correctly received as constituting the stimuli which caused the reaction by Marsden, and were thus clearly admissible, not to prove the truth of their contents, but in determining whether or not the response to each letter was that which may be expected from a capable person. For this purpose, their value clearly did not depend on the veracity, credibility or any subjective quality of their authors, and so no hearsay dangers are in question. The question which Maguire poses is whether the court was correct in receiving as non-hearsay the respective responsive behaviour of Marsden to each of these letters in order to prove his testamentary capacity. This question the learned author answers affirmatively, on the ground that no hearsay dangers are in question here either. With respect, this conclusion seems correct: the mere fact that Marsden answered the letters and reacted to the letters in the manner that he did supports in itself the conclusion that he was sufficiently capable of doing so. No question of credibility or veracity arises, and, reverting to our triangle, the trip from A to C does not necessitate a detour via B, the belief of the testator.

2. Maguire then turns to the three letters in question and examines the hearsay dangers involved:

(a) Insincerity: Although some of the judges pointed out that the writers may deliberately have disguised their belief for any of a number of reasons, "from affectionate consideration to contemptuous derision", he submits that the likelihood of such conscious duplicity in these particular letters

was "inconsiderable", and that in fact "no thought of manifesting any belief as to Marsden's mental capacities occurred to the writers".[27] As a result, Wright's case is "definite authority against any doctrine of escaping the hearsay label solely by getting away from the kind of conscious assertion which gives rise to a sincerity problem."[28]

While on the topic of insincerity as a hearsay danger, it is convenient to consider two commonly held perspectives which, it is submitted, may create problems:

(i) The first is the premiss that in the case of implied assertions the danger of insincerity is not in question. This contention is often put forward on the ground that because the actor/declarant did not expressly communicate the idea or concept which is being adduced in evidence, he is not likely to have misrepresented intentionally his belief or state of mind. While this is often the case, it may certainly not be stated as a universal rule. It is quite conceivable that the actor/declarant may have staged a charade, or a subtle stratagem to disguise his true beliefs, and, in an attempt to lend credibility to his misrepresentation, deliberately refrained from resorting to an express formulation of his supposed belief. To take an example: If X wished to sell a ship to Y, and he wished to convince Y of its seaworthiness, how much more convincing it would be to take his whole family on a cruise rather than to tell Y expressly that the ship is seaworthy. This illustrates the first type of

insincerity - danger possible in such evidence, viz that some assertions which may appear clearly non-assertive may in fact be assertive, in that the actor/declarant may deliberately assert a belief and disguise it in a non-assertive form.

However, even if we accept that an item of evidence is in fact non-assertive, the danger of insincerity is still not eliminated. In Wright's case, even if we accept that the writers of the three letters had no intention whatsoever to make any assertion on the issue of Marsden's sanity or competence, the possibility still exists that they may have written the type of letter which could be expected to be sent to a competent person, even though they believed Marsden to be incompetent. This could occur for one of many reasons, e g out of respect for Marsden, out of sympathy for his debility, out of servility in the expectation of some benefit from his will, out of fear of annoying someone near to Marsden etc.

(ii) The second problem concerns Maguire's examination of the specific facts of the case in order to evaluate the extent to which the hearsay dangers were present. As has been demonstrated above, once it has been shown that an item of evidence presents the traditional hearsay dangers, the hearsay status of such evidence cannot be lost by showing that such dangers can in fact be satisfactorily reduced by certain circumstantial indications of reliability. Certainly a strong argument

can be made out for the reception of such evidence, but to call it non-hearsay would be incorrect. This, in any event, is the position regarding express hearsay assertions, and there would seem to be no sound basis for applying a different principle to implied assertions.

(b) Perception: Maguire next examines the danger of inadequate perception, and, although conceding that the type of evidence in issue does bring into question this danger in that it "must for real probative value be based upon adequate perception and appreciation of relevant facts",[29] and that "[c]ross-examination becomes on many occasions very useful to test possible existence of such a defect",[30] he argues that this is only so "at large and in the abstract". He argues that one should not ask generally whether such danger could be present, but that one should examine the facts to see whether in fact it is present. For, he argues, the "common law does not shape its principles through abstract processes. It shapes them by continuous integration of perfectly concrete cases."[31]

Turning to the facts of Wright's case, the learned author points out that all three writers of the letters had plentiful opportunity to observe Marsden's mental capacity, one being his nearest relative and associate, and the other two being clergymen who lived and carried out their duties in the vicinity of Marsden's home. Therefore, he concludes,

> "Successful objection to the specific evidence for risk of inadequate perception is absurd unless

> the reality of the actual situation is to be remorselessly sacrificed to an inapplicable generality - certainly an evil paradox in the search for truth." [32]

It is readily conceded that to ignore the concrete facts of a case and to lable an item of evidence "hearsay" and subsequently to exclude it in spite of certain and indusputable guarantees of reliability, merely on the ground that the hearsay dangers in abstract are brought into question and have to be examined, is indeed an "evil paradox". But it is beyond question that express assertions cannot evade the hearsay label merely because there are indications as to their reliability, and, as has been submitted, there is no logical basis for distinguishing between express and implied assertions in this regard. Furthermore, this "evil paradox" would be eliminated if the courts were allowed a discretion to admit hearsay in respect of which there existed strong indications of reliability; for what harm would there be in labelling all assertions that raised the traditional dangers as hearsay, thereby compelling the courts to treat the evidence with the utmost caution, and then allowing the evidence to be received if the dangers can be satisfactorily accounted for?

It may be argued that, in the absence of reform, it is better to broaden the grounds of admissibility of at least some hearsay, and that, in respect of implied assertions, one should adopt Maguire's approach. However, there is no basis for this dichotomy, either in logic or by way of legal authority (particularly in view of Parke B.'s dictum in Wright's case). To depart from the traditional formulation of the hearsay rule in

respect of implied assertions alone would therefore be in conflict with such authority, and would further fragment the already confusing and irreconcilable concepts which make up our hearsay doctrine.

Reform is certainly desirable, if not essential. But once so bold a step is taken, it must create a uniform, logical and harmonious hearsay framework which would simplify the problem, not add yet another branch to the thicket.

(c) Memory: Maguire criticizes the judges in Wright's case for omitting to examine this hearsay danger, which, he points out, is often critical in that cross-examination and other courtroom techniques often reveal weaknesses in memory which are not initially apparent. However, he adds that in any event such risk in this particular case was "slight", as it was unlikely that the passing of time could have blurred the memory of the letter writers as regards Marsden's competence. For this reason he concludes that this risk, again, is no justification for the exclusion of the letters, a conclusion which is subject to the same criticisms and comments as those in (a) and (b) above.

(d) Ambiguity or the Risk of Misinterpretation: The learned author is quick to point out that this is one risk which is in fact more prevalent in implied than express assertions, because "[w]ith substitution of inferences for assertions ... real interpretative difficulties often arise." [33] Clearly an implied assertion is more likely to be misinterpreted than an express one; if an act or statement is used for a non-asser-

tive purpose to establish a fact or idea which the actor/ declarant did not intend to convey, then the risk of misinterpreting such act or statement is obviously substantially greater than if such act or statement were intended to be assertive. This danger was not considered at any length in the Tatham case, and the letters were generally construed as conveying a series of communications of such a kind as would be sent to a person who was sane and fully competent.

3. Maguire points out that while the three letters were excluded as being hearsay, the judges were "pleasantly acquiescent with respect to other rowdy evidence in the same case" [34] which exhibited glaringly the risks of insincerity and faulty perception. The evidence referred to was the testimony that people contemptuously called Marsden "Silly Jack" and "Silly Marsden", and that young boys had shouted "There goes crazy Marsden" and threw dirt at him. This, says Maguire, is "blatant intentional assertion, reeking with doubt as to adequate basis of observation, and also reeking with the possibility of cruel immature distortion of the truth". [35] With respect, it is submitted that the learned author is quite correct; there is no basis for excluding the letters yet admitting the evidence of the young boys. Both sets of evidence require the trier to examine the belief of the out-of-court declarant, necessitating the figurative trip via point B on our illustrative triangle, and both contain, in varying degrees, the standard hearsay dangers. The fact that the letters were non-assertive of Marsden's sanity whereas the boys' remarks were assertive is not per se a basis

for distinction, and both can be said to be "hearsay-like". To conclude that implied assertions contain fewer dangers and are thus less "hearsay-like" would be to pre-judge the issue without proper evaluation.

Professor Edmund Morgan also examined the case of Wright v Tatham in his famous article "Hearsay Dangers and the Application of the Hearsay Concept".[36] The learned author correctly makes the important observation that the case involved not only hearsay but also opinion. The assertion implied from the letters written to Marsden was that the authors held the opinion that Marsden was sane or competent. We are therefore dealing with hearsay opinion, and as Morgan adds, we are confronted with an additional testamentary danger which the trier has to evaluate, viz the ability of the declarant to draw a valid inference from the facts which he has perceived. This would necessitate the disclosure of all the data upon which his opinion was based.

The learned author contends that while the case may perhaps have turned on the opinion rule, the hearsay objection alone would nevertheless have proved insurmountable. To support this conclusion, he mentions that, of the examples of implied assertions set out by the judges in the Exchequer Chamber, only some contain opinion. Yet the court seemed to treat all of these examples as falling foul of the hearsay rule, and, therefore, warranting exclusion.

Two points are perhaps worth mentioning as regards the contentions of Professor Morgan:

1. It is respectfully submitted that to say the case turned

on the opinion rule may be an overstatement. Baron Parke, for instance, was of the opinion that

> "if any one of those writers had been living, his evidence, founded on personal observation, that the testator possessed the qualities which justified the opinion expressed or implied in his letters, would be admissible on this issue. [37]

This, it may be argued, would seem to suggest that the opinion rule alone would not have been sufficient to exclude the letters, but that the additional obstacle presented by the hearsay rule finally scuttled the evidence.

2. Another point worth mentioning is the fact that in many cases the question of implied assertions will involve consideration of the opinion rule. An implied assertion, as its name indicates, concerns an idea or belief which is implied or inferred from an express assertion. This idea or belief will often constitute an opinion, or an inference which the actor/declarant has drawn from a set of facts. So we are in fact dealing with two different inferential dimensions, viz the inference which the court draws from the express assertion to arrive at the implied assertion concerning the actor/declarant's opinion, and the inference which the actor/declarant has drawn from the facts on which his opinion is based. In Wright's case, for example, the court drew the inference from the letters that the writers believed Marsden to be sane, while the writers drew the inference of Marsden's sanity from their knowledge of Marsden's habits.

The first inference is present in all implied assertions, and, as we have seen, raises the danger of ambiguity or risk

of misinterpretation. The second inference, however, is an additional danger, and because of its high frequency in implied assertions, warrants incorporation into our model. Clearly the danger which faces the trier is the risk that the actor/declarant may not be sufficiently capable of drawing a valid inference from the facts. This can be depicted as an additional danger inherent in the trip from B to C, viz the enquiry as to whether the actor's belief corresponds with objective reality. Clearly there will be no congruence if the actor is not sufficiently capable of drawing a valid inference from the facts within his perception.

Weinberg [38] also examined the decision in Wright's case, and in particular the reasons for Baron Parke's extension of the ambit of the hearsay rule to implied assertions. These reasons, he concludes, were not expressly stated, but seem to be based on a conception that the rule excluding hearsay is a device designed to remedy the defect of evidence not subjected to judicial oath.[39] This rationale, says Weinberg, is deficient, and not in accord with the modern rationalizations of the rule, which tend to focus rather on the lack of opportunity to cross-examine or a combination of several factors (such as those discussed earlier). As the learned author points out, the requirement of an oath is a safeguard against only one of the hearsay dangers, viz insincerity or non-veracity. This, he argues, leads to an anomaly, for this is the very danger which is minimized in the case of implied assertions, for, as he puts it, "One is

scarcely likely to tell untruths if one does not intend specifically to communicate with another person." [40]

Although this argument may be challenged on the ground that, as has been shown above, the danger of insincerity is not always eliminated in the case of implied assertions, it is nevertheless submitted that the remainder of the argument is valid, and that the exclusionary rule must be seen to operate so as to remedy not only the absence of judicial oath, but all the factors which have already been considered above, including cross-examination, contextual setting of the testimony, opportunity to observe demeanour etc. However, as Weinberg hastens to add, this deficiency does not mean that Baron Parke's decision was incorrect. On a more detailed analysis, he adds, it may be quite correct to consider implied assertions as hearsay. But the learned judge erred, says Weinberg, in saying that the implied assertions contained in the letters written to the testator "may be considered in this respect to be on the same footing as if they had contained a direct and positive statement that he was competent." [41]

With respect, it is submitted that this point is valid and identifies the real problem, viz whether there exist any reasons for treating implied assertions any differently from express assertions. The only justification for such a distinction would be that implied assertions inherently contain different hearsay dangers, and that some of the normal dangers are removed by the non-assertive quality of the words or conduct. As Weinberg puts it, "The question which really has to be decided is whether the differences in the dangers

inherent in implied assertions still warrant their coming within the ambit of the hearsay rule". [42]

It is this crucial question which the court in Wright v Doe d Tatham left unanswered, and which will demand much attention in my subsequent analysis.

NOTES TO CHAPTER V

1 1837 7 Ad & El 313; 112 ER 488.

2 John M Maguire "The Hearsay System: Around and Through the Thicket" (1961) 14 Vanderbilt LR 741 at 750-1.

3 Wright v Doe d Tatham, supra note 1, at 316. Reference will be made only to the first citation, viz 1837 7 Ad & El 313.

4 At 317.

5 At 318-9.

6 At 319.

7 Maguire, op cit note 2, at 752.

8 At 338-9.

9 At 343.

10 At 351.

11 At 361.

12 At 381.

13 At 391.

14 At 385-6.

15 At 388-9.

16 At 401.

17 At 405.

18 At 368.

19 At 396.

20 At 397.

21 Ibid.

22 At 399.

23 Maguire, op cit note 2, at 752.

24 Id at 753.

25 Id at 754.

26 Ibid.

27 Id at 755.

28 Id at 756.

29 Ibid.

30 Ibid.

31 Ibid.

32 Id at 757.

33 Id at 759.

34 Id at 757.

35 Ibid.

36 (1948) 62 Harvard LR 177 at 207-212.

37 Supra note 1 at 384.

38 Mark Weinberg "Implied Assertions and the Scope of the Hearsay Rule" (1973) 9 Melbourne University LR 268 at 270-3.

39 Id at 272.

40 Id at 273.

41 Weinberg, op cit note 38, at 273, quoting Baron Parke in Wright v Doe d Tatham, supra note 1, at 385-6.

42 Weinberg, op cit note 38, at 273.

can this be admitted as evidence of X's guilt when offered on behalf of Y who is charged with committing that crime?

If X in such a case fled with the express intention of casting suspicion on himself in an attempt to draw suspicion away from the accused, then his conduct clearly falls foul of the hearsay rule as it is assertive conduct, indistinguishable from a nod of the head to indicate consent. If, however, X's intention was not to exonerate Y but to escape from the scene of the crime, then we are dealing with non-assertive conduct, from which a reasonable inference of X's guilt and Y's innocence may be drawn. Does such evidence infringe the rule against hearsay?

The approach of the United States courts is reflected in the following decisions:

(i) In Owensby v State,[4] the evidence was held to be hearsay. In the words of Clopton J:

> "It is also said that hearsay is not confined in the legal sense to what is said, that acts or conduct, as well as words, may be hearsay."[5]

The reason for the approach of the court appears to be that conduct of this nature is equivocal and unreliable, and that it is desirable to cross-examine the person who fled on the reasons for his flight. In the absence of such cross-examination, the court was of the opinion that the unprobed implied assertion of his guilt should be inadmissible.

(ii) In People v Mendez,[6] the evidence was rejected for the same reason, the court concluding that "[c]ircumstances of flight are in the nature of confessions by such third

persons and are, therefore, in the nature of hearsay evidence." [7]

(iii) State v Minella: [8] In this case the Iowa Supreme Court was faced with the following two items of evidence offered by the accused: (1) the flight of one Lovrea; (2) the possession by Lovrea of a revolver, and the fact that Lovrea had concealed it and denied its possession. The court admitted the second item as being relevant and proper on the issue as to who had fired the shot in question, but rejected the first item as being nothing more than a confession by a third party, and therefore inadmissible hearsay.

These three cases reflect the trend in the United States to regard such evidence as hearsay, [9] and it can be said that this is one of the few areas where the question of implied assertions has received some uniformity of treatment by the courts, and where the hearsay objection in this regard can be considered as having a reasonably high probability of being upheld.

An Australian case to have raised this question is Holloway v McFeeters, [10] a case which Cross [11] describes as being an instance where "the temptation to equate non-assertive conduct with assertive words proved too much for the High Court of Australia." In this case the plaintiff sued the Nominal Defendant for damages arising out of the death of her husband, who had been run down by a vehicle driven by an unidentified motorist. The question facing the court was as follows: "Is the fact that a motorist does not stop after running someone down admissible evidence of negligence on his part in proceedings to which he is not a party?" [12]

In the Supreme Court of Victoria (Full Bench), O'Bryan J held that the jury might infer that the driver knew that he had run down the man and severely injured him and had yet left him where he lay. The learned judge added that the jury might regard this behaviour as implying a consciousness of guilt and as being of the nature of an admission. On appeal, however, Dixon CJ and Kitto J held that the evidence was inadmissible (Williams, Webb and Taylor JJ expressing no final opinion on this point.) In the words of Kitto J:

> "It has been contended for the plaintiff that the various possibilities of the case should be considered in the light of the fact that after the accident the motorist disappeared and has not been discovered. Even if in all the circumstances the disappearance of the motorist were fairly open to be interpreted as an admission by conduct that some carelessness of his had been wholly or partly the cause of the collision, it would not be permissible to treat it as such in this action. In an action against the motorist an admission of negligence made by him in any form would be receivable as evidence against him; but in the present action no admission by the motorist can be receivable as such for the motorist is not the defendant and an admission forms no part of the facts which constitute the plaintiff's title to recover against the motorist. I express no opinion as to whether the flight of the motorist could properly be treated in an action against him as importing an admission, but in the present action it appears to me to add nothing of any significance to the case." [13]

To conclude, therefore, it would seem as if the courts in these cases have been "content, without very much discussion, to assimilate this conduct to an extra-judicial confession of the third party and thus to exclude it as 'pure hearsay'." [14] It is interesting, however, before leaving the 'flight cases', to examine the academic reaction to this judicial trend. According to Morgan, [15] such evidence is not hearsay within

the bounds of the traditional assertion-oriented formulation favoured by the courts, and he poses the question as to whether the definition of hearsay should be framed so as to include it. He examines the hearsay dangers involved and concludes that as X's conduct is non-assertive, in that he did not express his belief in his guilt, his veracity is not in any way involved. In addition, as he did not use words, there is no danger of a "peculiar use of language". However, there is a danger that an improper deduction will be drawn from his conduct, in that his flight may have been for a purpose unrelated to the crime in question. This, adds the learned writer, is not serious, as there is no more danger of a wrong deduction here than in other cases of circumstantial evidence. However, Morgan points out, the dangers relating to perception and possibly memory are of primary concern, as X's belief "is necessarily dependant upon the accuracy of his observation." [16]

Falknor is of the view that "flight evidence has considerably more to be said for it than the out-of-court confession"; [17] whereas such confession is assertive and intended by the declarant to convey the idea of his guilt, thereby making the trustworthiness of the evidence dependant on his veracity, flight evidence, says the learned author, does not raise this danger. In such cases, it may "safely be assumed that the actor fled, not to express or convey the idea of his guilt, but to escape detection and punishment," [18] if nothing to the contrary appears.

Maguire, [19] on the other hand, stresses that flight evidence

raises two serious problems: First, he points out, it is clear that the relevant inference which the trier is required to draw from the flight relates to the motive of the person fleeing - was it because of pure panic, an urgent need to escape interference with performance of some essential or innocent task, a sense of guilt as to some other matter, or some other reason out of a host of possibilities? This "ambiguity of inference", says Maguire, is equivalent to the problem of "properly interpreting obscure or equivocal testimonial language." [20] This, he says, brings into play the recognized principle that the desired conclusion be either "a natural or plausible one among the various conceivable ones" or alternatively the "more plausible or more natural out of the various ones that are conceivable." [21] Modern case law, says the learned writer, inclines towards the second, more stringent of these principles,[22] and accordingly it is necessary for the party adducing evidence of X's flight to convince the trier that his proposed conclusion as to X's motive is both acceptable and, in addition, more acceptable than the conclusion which his adversary seeks to attach thereto. This exercise, he argues, "does not demand specialized intelligence or learning, and may, properly be left to the mine run of jurors." [23]

In the words of the learned writer:

> "Everybody, also, must constantly exercise his wits in determinations as to intelligibility and proper interpretation of human actions. More often than not, we all manage this sort of problem quite well when action takes the form of declaratory speech or writing. While its handling much more frequently demands conscious deliberation when the problem is presented by choice of inferences which

> spring unintended from non-verbal human behaviour, results in that connection may be of even superior reliability, since here we can escape such confusion as resides in individualized vocabularies and foreign tongues. Manifestation through gesture, whether calculated or not, is a kind of lingua franca." [24]

In conclusion, therefore, Maguire submits that the problem of ambiguity of inference is not an "uncompromising stone wall barrier to admissibility". [25]

The second problem raised by the learned writer is that of sincerity - the fear that "admission of evidence of another's flight would encourage falsely trumped up semblances of guilt." [26] This danger, says Maguire, is also not insurmountable; "[e]ven where underworld risks lurk, why should it be hopelessly assumed that reliability of opposing counsel and common sense perceptiveness of jurors will lack adequate power to expose and appraise them?" [27] It is this "absolutism" in the application of the hearsay rule which has deprived judges of the preliminary fact-finding authority to determine whether hearsay does actually confront them or not. It is the assumption "that all hearsay is somehow very bad", [28] says Maguire, which has led to this undesirable state of affairs, an assumption which lies at the very heart of traditional hearsay theory.

(C). The Medical Treatment Cases

The type of problem which arises in these cases is as follows: W observes a medical practitioner, X, treating his patient, Y, in a particular manner; is this evidence admissible to establish that Y was suffering from a specific disease or ailment?

In the United States, this type of evidence has generally been excluded as hearsay:

(i) In Thompson v Manhattan Railway Co,[29] T sued the Railway Company for damages arising from personal injuries incurred as a result of a collision. It was alleged that the plaintiff had sustained spinal injuries, and evidence was tendered that the plaintiff had been treated for a spinal injury by a physician, who did not testify. The court held the evidence to be inadmissible, stating:

> "We think such proof was in the nature of hearsay. The treatment of the plaintiff for a particular disease was no more than a declaration of the physician that she was suffering from such a disease. As the declaration would not be competent, we think proof of the treatment was not competent." [30]

(ii) In the case In re Louck's Estate,[31] the court was faced with a question of survivorship as between two people killed in the same train accident. A witness was asked if he knew why one of the decedents was placed on a stretcher and the other decedent not, but the question had been ruled out. On appeal, it was held that ruling out the question was no error, as (inter alia):

> "The only purpose of such a question would be to elicit a statement from the witness that those placing the body on the stretcher believed Mr Loucks was alive. Their belief was not pertinent but only a statement of the physical facts supporting such belief was admissible in evidence." [32]

(iii) In People v Bush,[33] in order to prove that a prosecution witness did not have venereal disease, evidence was tendered that she was placed in a venereal disease-free ward

after she had undergone a Wasserman's test for the detection of syphilis. Clearly the action of placing her in such a ward was not intended to communicate anything about her condition to anyone, but was a medical decision based on the results of the test. Nevertheless the court excluded the evidence as inadmissible hearsay.

As with all categories of implied assertions, the academic reaction to these cases has been diverse:

Morgan[34] argues that such evidence, being evidence of an actor/declarant's state of mind and offered as a basis for an inference to the objective facts that created it, is no less hearsay than an assertion offered for the truth of the matter asserted and made by an actor/declarant who is not subject to the conditions imposed upon witnesses. In such cases, says Morgan, the physician is, in effect, making an assertion to himself, and his conduct is used as if it were such an assertion; "if he were to put his thought into words, they would express the proposition that the symptoms of the patient at least indicate that ailment".[35] Even if the doctor did not translate his mental impulses into words, such impulses thus translated would read something like this: "This patient's symptoms show that he probably has ailment X."[36] Therefore the trier is in much the same position as if the doctor had made such an entry in his diary or uttered an express assertion to that effect. Thus, Morgan argues, all the normal hearsay dangers are encountered, especially those relating to his powers of perception and memory. In addition, the problem is further complicated by elements of

opinion,[37] raising the additional dangers associated with hearsay opinion.[38]

Falknor,[39] on the other hand, while recognizing the hearsay nature of such evidence, argues that "these cases seem to typify the very sort of non-assertive conduct which, strongly vouching the actor's belief so as to give 'reasonable assurance of trustworthiness', is entitled rationally to more sympathetic treatment than a hearsay assertion".[40] As the learned writer points out, the conduct of the physician in Thompson's case in treating his patient for a spinal injury would "seem to amount to a sufficient avouchment of the physician's belief to admit evidence of the treatment as proof of the existence of a spinal injury."[41]

Finman,[42] however, argues that implied assertions such as those dealing with inferences resulting from medical treatment raise problems additional to the recognized hearsay dangers, which are not recognized by the courts. To illustrate his point, Finman refers to the facts of People v Harrison:[43] The defendant in this case had escaped from the police when they had attempted to arrest him on suspicion of homicide, and was found the next day in a field after having slashed his throat and wrists. The following day he made a confession while in hospital, but objection was taken thereto on the ground that it had not been made while the defendant was in a mental and physical condition to make a rational and coherent statement. The Supreme Court of California held that the confession was admissible, emphasizing that "he was questioned only with the permission of the

hospital attendants".[44] The purpose of this evidence, says Finman,[45] is clearly to indicate that the doctor believed that the defendant was in a fit state to be questioned. The problem, however, is whether the doctor, by consenting to the interrogation, intended to communicate any belief as to the defendant's condition. Because the doctor is not before the court, says Finman, the only way his intent may be ascertained is by inference from his conduct as an implied assertion. We are therefore asked to draw two discrete inferences from the same conduct:

1. whether the doctor intended to convey a belief as to the condition of his patient; and
2. whether he believed that the patient was in a fit condition to be questioned.

The facts of a case, however, will often not make it clear whether the conduct was or was not intended as an assertion, in that one inference will be no more probable than another. Therefore, concludes the learned writer, even before the problem of what to do with implied assertions is answered, a court is first faced with the not inconsiderable task of determining whether an assertion is in fact assertive or non-assertive. This exercise in itself, says Finman, presents the court with the same type of problem as assessing the worth of an implied assertion because in effect we are dealing with another species of implied assertion. Accordingly, the court again will have to "consider the extent to which reliance on the evidence entails dangers eliminable through cross-examination",[46] a decision "based on a complex exercise

of judgment." [47]

Any decision to limit the scope of the hearsay rule by legislation to cover only express assertions would therefore not solve the question of admissibility, but merely re-state it.

(D). The Treatment as Evidence of Relationship Cases

Under this broad heading, Weinberg seems to deal with two distinct types of cases:

(a) Cases where the actor's conduct is tendered to prove that a testator possessed full testamentary capacity

Cases falling within this category are:

(i) Wright v Doe d Tatham, [48] which was discussed at length above. [49]

(ii) In re Hine, [50] where evidence that the children of the neighbourhood made fun of the testatrix was tendered as proof of her insanity, the court held that the evidence was hearsay and inadmissible.

(iii) In Estate of Laveaga, [51] the court again had to consider the admissibility of evidence that the testatrix' family treated her as incompetent to manage her affairs, and concluded (per Judge Angellotti) that "the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extra-judicial expression of opinion on the part of the family". [52]

It is interesting to note that evidence of the type rejected

in Hine's case was admitted by the court in Wright's case. In the latter case, evidence was received that people contemptuously called the testator "Silly Jack" and "Silly Marsden", and that young boys shouted "There goes crazy Marsden" and threw dirt at him. As Maguire points out:

> "Here is blatant intentional assertion, reeking with doubt as to adequate basis of observation, and also reeking with the possibility of cruel immature distortion of truth." [53]

Falknor [54] also points out that the hearsay dangers in this type of evidence are just as great as in the case of express assertions. In addition, he contends, the belief of the actor in this case "lacks the strong avouchment which, for example, is so apparent in 'the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family'". [55] Therefore, he adds, there is nothing in the evidence which gives any "reasonable assurance of trustworthiness", which McCormick [56] suggests as a safeguard so as to exclude evidence of "mere casual, unimportant or frivolous conduct." [57] The best safeguard, according to McCormick, is the importance of the conduct to the actor; it is only when the conduct is of some genuine significance or importance to the actor that the learned author is prepared to conclude that there is a likelihood of greater trustworthiness than in the case of an express assertion. In cases such as those considered above, this safeguard is absent.

Finman, [58] on the other hand, argues that cases such as In re Hine illustrate that only in some isolated cases will the

actor's conduct be "sufficiently important to justify reliance on his uncross-examined memory and perception." [59] Thus he concludes, the importance of conduct in itself does not provide a rational basis for classifying implied assertions. A number of factors may affect the reliability of an implied assertion, which the learned author discusses in depth and which will be considered at a later stage.

(b) Cases where an actor's conduct is tendered to prove the existence of a relationship between the actor and another

According to Cross,[60] "there is a considerable body of authority to the effect that treatment is admissible evidence of relationship." This "authority" includes inter alia the following cases:

(i) The Dysart Peerage Case:[61] In this case, the issue was whether Lord Huntingtower and a certain woman had contracted an informal marriage according to the laws of Scotland. Evidence was tendered of certain letters and statements of the parties which tended to establish their matrimonial status, but this evidence was held by the court to be inadmissible. According to Lord Blackburn,

> "the statements of Lord Huntingtower, though not a party to the cause, yet being one of the alleged marrying parties, would, whether he was alive or dead ... be admissible whenever they were part of the res gestae, and part of what would tend to shew that his conduct before or after, was such as to affirm, or disaffirm, the alleged contract that was said to constitute a marriage in Scotland." [62]

However, the learned judge added, because Lord H later mar-

ried a lady in England, which was "the most positive assertion that a man could make that he was an unmarried person",[63] no such statement as to whether he had been married before could "be received as part of the res gestae, tending to prove or disprove, affirm or disaffirm, the previous evidence of a marriage in Scotland."[64] The learned judge was clearly of the opinion that the statements of Lord H were hearsay, a conclusion borne out by his finding that even if the English law of evidence were applicable,[65] the evidence would not be rescued by the exception relating to pedigree declarations of deceased persons, as the statements in question were made post litem motam, after he had married another lady in England. In any event, Lord Blackburn concluded, according to Scottish law it was required that the declarant be a competent witness if called to testify, a requirement which in this case was not satisfied, as no person could give evidence which would render his issue illegitimate.[66] Therefore, because "he could not have given evidence when alive, it cannot possibly be competent to give secondary evidence of what he would have said if his death had not prevented him."[67]

(ii) The Aylesford Peerage Case:[68] The issue here was whether the father of Lady Aylesford's child was her husband, the seventh Earl of Aylesford, or the Marquis of Blandford. Letters were produced which had been written by Lady Aylesford and Lord Blandford in which certain arrangements were made for the child. It appeared from these letters that their authors considered Lord Blandford to be the father of

the child, and the court admitted the evidence to corroborate other evidence of Lord Blandford's paternity. However, the court was at pains to point out that the letters could not be admitted "as evidence as to the truth of their contents, but as part of the res gestae, in that they threw light on the conduct of the mother at the material time."[69] This view is borne out by the following passages:

Lord Blackburn:[70] "I must first observe that these letters are not and could not be received as being statements by Lady Aylesford in themselves. If Lady Aylesford were ever so admissible a witness for these purposes her letters would not be evidence. She must be called and cross-examined, supposing that she were admissible as a witness."

Lord Bramwell:[71] "As mere declarations by Lady Aylesford, of course [the letters] would not be admissible; they are only admissible as part of the conduct - part of the res gestae ... "

Earle of Selborne:[72] "[I]t is said that a declaration bearing directly upon the point, if occurring in such a letter, ought not to be received. I agree that it should not be received as direct evidence of the fact ... But I cannot hold that a letter otherwise admissible, which is an important act of conduct done by the mother, is to be excluded in whole or in part (if it were possible to divide one part from the other) because it may contain such declarations. These declarations are facts as well as statements. It is a fact that for some purpose or other the mother wrote a letter containing such statements at such a time. Your Lordships

> will not take them as proving the fact; but the fact that the mother did write such a letter, at such a time and for such a purpose, as it appears to me, is a thing which ... ought not to be excluded from consideration."

(iii) Burnaby v Baillie:[73] The issue in this case was very similar to that before the court in the Aylesford Peerage Case, and in order to establish the paternity of Mrs Burnaby's child, a certain H was called as a witness to testify to a conversation between herself and W, who was Mrs Burnaby's paramour. This conversation related to certain arrangements for the expected confinement of Mrs Burnaby, and objection was taken to the admissibility of the evidence. The court, however, found that the evidence was admissible, North J stating the reasons of the court as follows:

> "I think this evidence is admissible. I cannot distinguish these statements made in conversation from the letter of Lord Blandford, which was deliberately admitted by the House of Lords in The Aylesford Peerage Case. It seems to me that the verbal statements of Mr Willoughby are just as admissible as if he had put them into writing. I do not treat the statements as evidence of the truth of the matters stated, but I think they are admissible as shewing that he was making arrangements for the expected confinement of the lady whom he was then living with, and representing as his wife."[74]

(iv) Lloyd v Powell Duffryn Steam Coal Co Ltd:[75] In a claim for compensation under the Workmen's Compensation Act 1906 by a posthumous illegitimate child as a dependent of its putative father, the following evidence was led to establish paternity:

1. Alice Lloyd, the mother of the child, testified that on the Sunday before the death of her lover, W, she went for a walk with him. During the walk, she started crying, as she knew that she was pregnant. However, she testified,

> "[h]e told me not to worry because we would be married in plenty of time. He had wanted to marry me before I got into that condition. I told him the child would be born in May. It was born on the 15th of May." [76]

2. Mrs Matilda Evans, at whose house W had lodged, stated that in a conversation which she had had with W the night before the accident, he had said that Alice Lloyd had told him some things that troubled him very much, but that it did not matter because he would marry her soon enough. She then asked him whether he meant it, and he replied that he would marry her before May. He looked, said Mrs Evans, to be vexed.

3. William Jones, a room-mate of W, testified as follows:

> "Whittall was my bedmate. He was away from lodgings from October 7-10. After he came back I had a conversation with him. He said he was afraid Miss Lloyd was in trouble - it was a case of getting married. He asked if I knew where he could get a house as I was working on the cottages ... He wanted to work as much as he could now to provide a home for himself and Miss Lloyd." [77]

Objection was taken to this evidence, but the county court judge held the evidence to be admissible as being statements made by the deceased against his interest. The Court of Appeal, however, set aside the decision on the ground that the statements were not shown to be against interest. The

House of Lords finally held the evidence to be admissible. In so doing, it was stated that the Court of Appeal had not erred, as the only issue before it was whether the evidence was admissible as a statement against interest, and in rejecting the evidence on this ground it had not erred. The evidence was, however, admissible on another ground. In the words of Lord Atkinson:

> "The proposal to marry and the acceptance of it may, of course, be made by word of mouth; but the making and the acceptance of it are acts, matters of conduct, and strong pieces of evidence on the issue of paternity, inasmuch as they shew the character in which the parties regarded the child en ventre sa mère, and desired to treat it." [78]

The issue in this case, said the learned judge, was indistinguishable from that in the Aylesford Peerage Case, where the letters were "given in evidence as proofs of matters of conduct." [79] Lord Atkinson added that

> "[t]o treat the statements made by the deceased as statements made by a deceased person against his pecuniary interest, and therefore, though hearsay, proof of the facts stated, is wholly to mistake their true character and significance. This significance consists in the improbability that any man would make these statements, true or false, unless he believed himself to be the father of the child of whom Alice Lloyd was pregnant." [80]

Lord Shaw of Dunfermline was of the view that the statements of W should be admitted because

> "such statements, proved to have been made at the time and in the circumstances such as occurred in the present case, are part of the res gestae equally with actual contracts entered into by the deceased or conduct apart from words, both of which contracts and conduct could undoubtedly have been proved." [81]

Lord Moulton, on the other hand, felt that

> "the state of mind of the deceased, so far as it bore on his acceptance of his position as the father of the child and his intention to fulfil his duties as such, was relevant to the issue of dependency, and that the evidence in question was admissible as being proper to determine his state of mind." [82]

He also added that

> "[t]he connection between the conversation and the information as to paternity is so close that it is probable that the evidence would be admissible under the head of the res gestae, but its admissibility, on the grounds I have just mentioned, is so clear that it is not necessary to examine this further question." [83]

Earl Loreburn held the evidence to be admissible, but did not mention the hearsay problem at all, arguing that it was highly relevant to the issue of dependency.

It is evident, therefore, that no single common principle can be gleaned from Lloyd's case. Morgan,[84] in fact, complains that "[n]ot one of the opinions of the lords states the testimony accurately or attempts a searching analysis." He dismisses Earl Loreburn's opinion as unhelpful, adding somewhat deprecatingly that "it did not require an appeal to the House of Lords to demonstrate that the testimony was relevant." [85] He also criticizes the view that the evidence be admitted as proving state of mind, arguing that "Whittal's state of mind was, of itself, of no importance on the issue of paternity; its sole relevance was as the foundation for an inference to his conduct which caused him to have that intention." [86] Such evidence, the learned author points out, only falls within an exception to the hearsay rule if used only to prove a presently existing state of mind.

Morgan next considers the view of Lord Atkinson that W's de-

clarations of intent to marry Alice Lloyd could not be hearsay because, whether true or false, they showed that W believed himself to be the father of the child, and intended to support it. This argument is, according to Morgan, fallacious; if W's declarations were false, he argues, they could be no basis for an inference that he intended to support the child. Instead, they might tend to show that, although he did not believe himself to be the father, he nevertheless stated his intent to marry her in an attempt to prevent "disagreeable measures" [87] being employed by Miss Lloyd or her friends. "It seems somewhat farfetched", he adds, "to contend that making possibly false statements of intention in these circumstances indicated a consciousness of guilt." [88] With respect, it is difficult to disagree.

Nor does the reasoning of Lord Moulton escape the whip: the learned judge could not see how testimony as to a declarant's words could be distinguished from testimony concerning his other relevant acts, adding that "[s]peaking is as much an act as doing." [89] But, says Morgan,

> "whether or not a person's conduct which is not in any way intended by him as an assertion may be non-hearsay evidence of his subjective condition, assertions made by words or otherwise by a person not under oath and not subject to cross-examination are certainly no less hearsay when the matter asserted is a subjective condition than when it is an objective condition or event." [90]

Finally, Morgan directs his attention to the argument of Lord Moulton and Lord Shaw of Dunfermline that the statements should be admissible for the truth of what they asserted on the ground that they were part of the <u>res gestae</u>. This con-

tention is cursorily discussed as being "nonsense", as "there is no rule which incorporates as part of a contract a later statement of intention to carry it out." [91]

One of the most lamentable and, perhaps, significant aspects of Lloyd's case was the omission on the part of the House of Lords to mention, let alone discuss, the case of Wright v doe d Tatham. As Morgan observes,[92] it may well be that "the venerated, but far from venerable, fiction that the House of Lords never overrules one of its own decisions" may have constrained the court from raising the issue. It may have been true that John Marsden was "a dull dog at best",[93] but his ghost was nevertheless destined to haunt the corridors of justice with a tenacity that was to ensure him immortality.

What general trend may be discerned from these cases? It appears that the courts are prepared to admit evidence of statements which do not expressly assert the fact of paternity, but which impliedly give rise to an inference to that effect. The reason for this approach is neatly summarized in Lloyd v Powell Diffryn Steam Coal Co Ltd as follows:

> "It must be borne in mind that there is nothing in the admission of such evidence which clashes with the rooted objection in our jurisprudence to the admission of hearsay evidence. The testimony of the witnesses is to the act, ie to the deceased speaking these words, and it is the speaking of the words which is the matter that is put in evidence and which possesses evidential value. The evidence is, therefore, not in any respect open to the objection that it is secondary or hearsay evidence." [94]

However, does the mere "speaking of the words" have any real "evidential value" divorced from its value as an implied asser-

tion? Surely the trier is required to rely on the truth of the assertion in order to draw an inference that the declarant regarded himself as being the father of the child. If W were to testify that X had told him in a conversation that he was making arrangements for the birth, maintenance and upbringing of the child, would this statement have any testimonial value if one were to disregard the following assumptions:

1. X was sincere in making the statement;
2. X's narrative ability was such that there was no real possibility of ambiguity of expression;
3. X was in a position to form an opinion as to his paternity; and
4. X's powers of memory and perception were reliable?

In Re Jenion, Jenion v Wynne,[95] Jenkins CJ was of the opinion[96] that "[s]tatements evidencing (for example) a course of conduct in relation to the arrangements made for the birth, maintenance and upbringing of the child, or to the treatment of the child in later years, are obviously in a quite different category" from express assertions of paternity. The latter assertions the learned judge was not prepared to admit as part of the res gestae on the ground that to do so "would have amounted to nothing less than doing indirectly the very thing the rule forbade, that is, admitting the woman's statement by a circuitous route as evidence tending to bastardise her children born in wedlock."[97] (Italics added). If a statement is not admissible to prove the truth of its contents, how, the learned judge asked, "could it advance the matter to admit the same evidence, not as proof of the truth

of the statement, but as proof of the fact that, true or false, the woman did make it?" [98] (Italics added).

As regards express assertions, it is submitted, the learned judge's logic is flawless: if a statement is inadmissible to prove the truth of its subject-matter, it can surely in such cases be of no evidential value as proof of the fact that, true or false, the declarant did make it. Is it, however, correct to say that statements evidencing conduct of the kind described are in a different category? Clearly, as the courts have been at pains to emphasize, these statements are not admissible to prove the truth of what they assert. Is it then correct to admit them "by a circuitous route" to establish the same fact? Do they have evidential value as proof of the fact that, true or false, the declarant did make it? The only evidential value such statements may have, is as evidence of the declarant's belief, which is of no real value unless the trier relies on the truth or accuracy of the belief. In other words, the evidence is only of value if the belief of the declarant is of itself an issue before the court. In this respect, there is no difference between express and implied assertions of paternity. In answer to the argument that express assertions of paternity be received as part of the res gestae, Jenkins LJ stated that

> "[a]s to Rooney's statements treated as part of the res gestae ... they can, in my view, carry the matter no further than this, that Rooney ... (rightly or wrongly) believed himself to be their father, a circumstance which in my view, can add virtually nothing to the other evidence in the case." [99]

It is submitted that there is no logical basis for treating

implied assertions any differently. As Schiff points out:

> "On the issue of paternity in Lloyd, the House of Lords adopted an argument translating the declarant's belief based on his assumed previous perception and memory of disputed facts into a state of mind whose verbal expression was immune to the hearsay rule." [100]

This argument, the learned author adds, was rejected by the Supreme Court of the United States in Shepard v United States.[101] In that case, evidence was tendered that the deceased had said "Dr Shepard has poisoned me", and it was argued that the evidence was receivable, not as evidence of the truth of the matter asserted, but as tending to prove that the deceased had a state of mind inconsistent with an attempt to commit suicide. The court, however, in the words of Mr Justice Cardozo, held as follows:

> "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and yet reject them to the extent that they charge the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed." [102]

(E). The Silence Cases

The categories of implied assertions considered thus far have all dealt with non-assertive conduct of a positive nature. The question which arises here is whether non-assertive non-conduct should ever fall within the scope of the hearsay rule, i e whether the fact that no speech or conduct has occurred, if tendered as evidence of the truth of an implied

assertion, would infringe the rule against hearsay. This problem has been analysed with admirable perceptiveness and inexorable logic by Prof Falknor in an article entitled "Silence as Hearsay",[103] to which constant reference will be made during the course of this discussion.

As with the other categories of implied assertions, this question has elicited a diverse spectrum of views from judicial and academic sources alike. However, before attempting an analysis of the case law on this topic, it is instructive to bear in mind the following caveat:

> "Preliminarily, it ought to be said that in none of the cases do we find anything like an adequate discussion of the problem presented. In none is apt authority cited, and in nearly all, the problem rests on nothing more than the ipse dixit of the court that the evidence is or is not hearsay. In a very few of the cases the court has extended itself to the point of assimilating the failure to speak to an assertion of the belief evidenced thereby. And as has already been said, in no case has a court noticed the quality of non-assertiveness and its significance." [104]

With this warning in mind, it is interesting to look at how the courts have approached the problem. Falknor points out that the "silence" cases fall into two easily identifiable groups:

Group I: Those cases "concerned with the admissibility of evidence of the failure of the buyer of goods to complain, on an issue of quality; or of the failure of one who might have been injured in an alleged accident to give notice of or make any claim for injury, on an issue as to the occurrence or severity of the accident." [105]

Included in this category are the following cases:

In the English case of Manchester Brewery Co Ltd v Coombs,[106] the issue before the court was whether bad beer had been supplied to a pub by the plaintiff company. At the trial, counsel representing the licensee sought to ask a witness the following question: "Have you received complaints from customers?" Objection was taken to this question, but the trial judge held it to be permissible on the following grounds:

> "According to my recollection, this question has always been allowed in actions of this nature, and I think for this reason. Counsel can certainly ask as to facts - Did the customer order beer? Did he finish it? What did he do with it? If the matter is left there with the answer that he tasted and left it or threw it away, the judge cannot avoid drawing an inference, and the cross-examining counsel is driven to ask for some explanation. It is simpler, therefore, to allow the statement of the customer of the reason of his conduct to be given in chief."[107]

In St Louis S W Railway v Arkansas & T Grain Co,[108] a claim was brought by the grain company against the railway company for the conversion of a quantity of corn of "No. 2" quality. Evidence was tendered that the corn in question was a part of a 60 000 pound supply which had been sold to retail dealers in that region as No. 2 corn, and that no complaint had ever been made by any of the purchasers. The Texas court held the evidence admissible as:

> "The witness simply stated a fact within his own knowledge; that he did sell it in the course of trade as No. 2 corn, not at retail, but to retail dealers, and no complaint was ever made. These are facts and not declarations of third persons."

A Texan court, eight years later, however, came to the opposite conclusion. In George W Saunders Live Stock Commission Co v Kincaid,[109] an action was brought by a purchaser of hogs to recover for the seller's misrepresentation that the hogs were sound. Evidence that no complaint had been made by the packing companies, who had purchased hogs from the same shipment, was rejected without even referring to the St Louis S W Railway case. In support of its ruling, the court said:

> "We do not think it would be permissible merely to show that no complaint as to diseases among the hogs had been made by the packing houses purchasing them. That complaint was or was not made would appear to be pure hearsay. It perhaps would be permissible to show by witnesses who knew the facts that other hogs contained in the shipment with those in controversy were or were not affected with disease, but this is altogether another question."

The New York court in Altkrug v William Whitman Co[110] reached the same conclusion in excluding evidence that goods rejected by the plaintiff, who was suing for breach of warranty concerning the quality of woolens sold, had subsequently been sold to other customers who had made no complaint. This evidence, said the court, was

> "clearly hearsay evidence as to the opinions of other customers upon these goods. This evidence was most mischievous evidence, and might well have been a controlling factor in the minds of the jury in determining that the goods in question were up to sample."

Similarly, in James K Thompson Co v International Compositions Co,[111] another New York decision, evidence that no other customers had complained of the quality of oil from

the same lot was excluded, as:

> "The fact that other customers had made no complaint as to the quality of the goods sold to them was pure hearsay evidence upon the question of the quality of these goods."

The court in Sullivan v Minneapolis Street Railway Co,[112] a Minnesota case, did not identify the hearsay problem at all. In deciding whether the plaintiff's statement was true that all standing passengers in a street car had been thrown to the floor, evidence was admitted that no other claims had been made against the defendant company. The court seemed to assume that the only question was one of relevance, holding that the evidence was admissible because "it had a direct tendency to show that the statements of a witness on one side were more reasonable and therefore more credible than the statements of a witness on the other side." The court did add the warning, however, that such evidence must be received with caution.

In Fogg v Oregon Short Line R R,[113] the plaintiff sued for compensation in respect of injuries to his knee sustained in an accident. The defendant alleged that the injury had been sustained in a previous accident, and, to rebut evidence to that effect, the plaintiff's wife gave evidence that the plaintiff had made no complaint of any injury to his knee pursuant to the prior accident. This evidence was admitted on the following grounds:

> "It seems to be well recognized that declarations of present pain and suffering are admissible as original evidence in all inquiries, where pain and suffering constitute the question involved." [114]

This reasoning, says Falknor, seems to be sound, "because if a statement of presently existing pain, which by hypothesis, is assertive, is able to qualify against the hearsay rule, then conduct (i e failure to complain) which presumably is non-assertive and thus somewhat more trustworthy, ought likewise to be admitted."[115] It is respectfully submitted, however, that Falknor's comments on this case may be questioned on two grounds: Firstly, the learned author states that the court in Fogg's case was of the view that "even though the failure to complain be treated as hearsay, still evidence thereof will come in under the exception for declarations of a presently existing mental or physical condition";[116] this conclusion is not borne out by the court's finding that the evidence should be "admissible as original evidence", i e as non-hearsay evidence. Secondly, it is submitted that it may be debated whether a failure to complain of an injury is necessarily more trustworthy than a positive assertion of pain; one may have cogent reasons for not divulging information to one's wife about injuries sustained, such as a desire to avoid causing her anxiety.

One of the most interesting decisions, and indeed one of the few cases to have considered the hearsay dangers at any length, is that of Silver v New York Central Railway Co.[117] The plaintiff, who was suffering from a circulatory ailment, had suffered ill effects after the temperature in one of defendant's railway cars in which she was travelling had dropped, owing to a four-hour wait in a railway yard for connection with another train. She accordingly brought an action against the railway company, and one of the questions

which arose was whether the porter in the plaintiff's car should be permitted to testify that none of the other eleven passengers in the car had complained to him of the temperature. The court considered first the following cases:

(i) Menard v Cashman,[118] a delictual action arising out of a fall on a defective stairway in a business block, where the court excluded evidence of a tenant that none of her customers had ever complained of any such defects. This evidence, said the court, had the characteristics of hearsay.

(ii) Landfield v Albiani Lunch Co,[119] where the plaintiff had alleged that he had fallen ill after eating beans purchased at the defendant's restaurant. Evidence was admitted that no other complaints as to the beans had been made, the court adding the proviso that there was "evidence of circumstances indicating that others similarly situated ate and had opportunity for complaining."[120]

After considering these cases, Wilkins J concluded as follows:

> "It has often been said that where collateral issues may be opened, much must rest in the discretion of the trial judge ... In the case at bar, should the circumstances of the plaintiff and of the other passengers as to exposure to the cold be shown to be substantially the same, the negative evidence that none of the others spoke of it to the porter might properly be admitted. The evidence would not be equivocal, and would then be offered on the basis of a common condition which all in the car encountered. The porter's duties should be shown to include the receipt of that sort of complaints from those passengers. It should appear that he was present and available to be spoken to, and that it was not likely that complaints were made by those passengers to other employees of the railroad or the sleeping car company. This would not seem to be a situation where one might prefer to remain silent rather than to make any statement. Indeed, if

> the car was too cold, ordinary prudence might seem to require that one speak out. There would be no ambiguity of inference. There would be at least as strong a case for admissibility as in the food cases, and a far stronger one than those relating to the sale of allegedly defective goods in which little may be known of the terms of sale to the non-complaining buyers. Unlike the unknown users of a stairway in a business block, the uniform result of silence in the cases of a large number of passengers, here apparently eleven, would not be inconclusive."[121]

The interesting aspect of this decision is that the court analysed the evidence in question and assessed its reliability. In so doing, an attempt was made to lay down conditions for admissibility which would eliminate at least one of the hearsay dangers, viz ambiguity of inference. The other hearsay dangers would also seem to be greatly reduced in this instance, for, as Weinstein[122] remarks, "[i]t was highly unlikely that all the other passengers were Eskimos or stockholders of the company or masochists". And, as Maguire[123] observes, the danger concerning defective memory does not arise, as "the indicative behaviour exactly synchronized with sensation". As has been stated before, this fact, although it may not be an argument for labelling the evidence non-hearsay, is a powerful consideration on the issue of admissibility, and reinforces Weinberg's argument that labels are mere conceptual tools and should not be used exclusively to answer the question of admissibility.[124]

One of the most unequivocal judicial statements that evidence of this nature is non-hearsay is to be found in Cain v George[125] where, on the issue of whether a gas heater in a motel room was defective, absence of complaints from other

occupiers of the room was admitted. The reasons of the court appear from the following passage:

> "This testimony was relevant on the issue ... that carbon monoxide came from the smoldering chair and clothing and not from the gas heater ... Such testimony merely related the knowledge of the motel owner as to whether anyone was ever harmed by the heater. It was not hearsay as it derived its value solely from the credit to be given to the witnesses themselves and it was not dependant upon the veracity or competency of other persons ... We think it was admissible to show how the heater had acted in the past." [126]

Although it could validly be argued that the hearsay dangers in this case were reduced, it is, with respect, difficult to see how the evidence could have any testimonial value unless the competency and veracity of the other occupiers is relied upon. What if the other occupiers had not used the heater since the defect manifested itself; what if they had noticed the defect, but forgotten to report it, or simply had not cared? It has often been said, moreover, that non-assertive conduct leads to greater ambiguity of inference than assertive conduct. Is this not at least equally true, if not more so, of non-assertive non-conduct or silence? The possible reasons for a person not speaking or taking action may be many, and to draw one inference from the realm of possibility is a hazardous undertaking and one fraught with risk. This fact is well illustrated by the way South African courts have treated the question of admissions: admissions are admissible by way of exception to the rule against hearsay,[127] and may consist of any statement or conduct which is damaging to a party's case. However, in the case of non-conduct or silence, the courts exercise more care, as

"[s]ilence might in certain circumstances indicate consciousness of guilt, but it could also mean that the party concerned did not think the imputation worth answering, or that he considered it tactically advisable to say nothing and reserve his defence." [128] If the courts exercise caution in cases of admissions, where silence or non-conduct is detrimental to a party's interests, how much more necessary is it to be cautious in cases where silence is not damaging, or where the party's inaction was of no importance to him at all in the conducting of his affairs?

Group II: These cases concern "the admissibility of evidence of the failure of one alleged to have made an agreement, executed an instrument or to have been served with process, to mention the disputed act or event to his family or associates, on an issue as to the occurrence of that act or event." [129]

Examples of cases which fall into this category are:

(i) Lake Drainage Commissioners v Spencer: [130] The issue before the court was whether the defendants' mother had been served with a summons, and the trial court allowed the defendants to testify "that they never heard their mother say anything to anybody about the summons having been served upon her". The North Carolina court, however, held this to be error, saying:

> "In the first place, if the witnesses had testified affirmatively that Mrs Spencer had said that the summons had not been served upon her, it would have been incompetent as hearsay. It is all the more incompetent in this negative form that they had heard her say nothing about it, which proves nothing, and if it proved any-

> thing, would tend to show that she had been served." [131]

(ii) Sloan v Sloan,[132] where evidence that a witness heard no remarks by the deceased at a dinner party that the deceased and the plaintiff were married was held admissible on the issue of marriage. The hearsay problem was not raised, the court deciding the issue as follows:

> "The statement is negative in character, but that goes only to its probative force. We see no reason why the witness' failure to hear a remark inquired about may not be testified to when the circumstances are such as to properly lead to the inference that the remark would have been heard had it actually been made, in opposition to affirmative statements that such a remark or declaration was made." [133]

(iii) In People v Layman,[134] where the issue was whether the defendant had been involved in an accident, which he alleged took place while he was pushing his automobile off the railway tracks, evidence was admitted by the California court that no report of any accident had been received by the train dispatchers. The defendant's objection that such evidence was hearsay was met with the following reply:

> "Appellant complains that it was error, in violation of the hearsay rule, to permit the train dispatchers to testify that they had received no report of an accident. It was not hearsay, but direct proof, of course, of a fact; the fact being that no report had been turned in. This fact was material because of the presumption that the ordinary course of business had been followed ... that is, that if there had been an accident it would have been reported to the dispatchers." [135]

Falknor expresses doubt as to the correctness of this decision, and finds it difficult to see how the statutory presumption "which merely goes to the extent of recognizing that

in the ordinary course of business an accident will be reported, disposes of the hearsay question."[136]

(iv) The issue in Sherling v Continental Trust Co[137] was whether the testator, T, had concluded an oral agreement with the plaintiffs, in terms of which he would give them half of all his property on his death. A witness for the defendant was permitted by the trial court to give evidence that the testator had never said anything to her about such an agreement. The Georgia court held this to be error, saying that "[i]f he had denied to the witness making such a contract it would have been objectionable as hearsay testimony." Similarly, the evidence tendered was "in the nature of hearsay" and irrelevant.

(v) On facts of a similar nature, the Texas court in Latham v Houston Land & Trust Co[138] held to be admissible evidence that a testator had never mentioned the creation or existence of a trust to his wife or attorney:

> "Certainly this testimony is cogent and material. It is not hearsay testimony. It is a statement of fact and very cogent and material and so far as appellants are concerned, damning, in that this trust fund was never mentioned by themselves in their close family conversations ... "[139]

(vi) Again, in Segars v City of Cornelia,[140] the issue arose as to whether a person's failure to mention the execution of an easement agreement could be used to show that such agreement had not been concluded. The Georgia court upheld the trial court's decision to exclude the evidence,

stating:

> "Even if Mrs Segars had then denied giving the easement, such denial would not be admissible because it would be hearsay, and might also be a self-serving declaration." [141]

Having thus categorized the "silence" cases into these two groups, Falknor conducts an analysis of the hearsay dangers inherent in each. His comments and observations may be summarized as follows:

(1) He first compares the respective testimonial value of non-assertive conduct (i e positive implied assertions) and non-assertive non-conduct (i e negative implied assertions, or silence): Falknor, following the views expressed by Mc Cormick, [142] is of the view that implied assertions generally should only be admitted if there is a preliminary finding that "the action so vouched the belief as to give reasonable assurance of trustworthiness." [143] This requirement, says Falknor, is most commonly satisfied if it is shown that the conduct was important or significant to the actor in his affairs. If positive and negative conduct are compared, it is clear, he adds, that this avouchment is far stronger in respect of the former than the latter; the fact that a customer <u>used</u> a particular product in a particular way that was important to him is of far more probative value than the fact that he failed to lodge a complaint as to its quality. Some other safeguard must therefore be found to guarantee the trustworthiness of non-assertive non-conduct.

(2) He then compares the two groups of cases, and points

out that although both groups involve the same chain of inferences (viz from the failure to speak, to belief, to the fact to which the belief points), there are nevertheless important differences between them as regards their trustworthiness:

(i) The danger of the assertive intent (i e that the conduct was intended to be assertive) is weaker in the first group than the second, as a result of the detrimental quality of the non-conduct in the first group. The fact that a customer failed to complain about the quality of goods purchased, or that a passenger failed to mention that he had sustained injuries, is of a disserving nature; on the other hand, the failure to mention that one had been served with a summons or had made an agreement does not possess this quality. In the latter instance, the failure to speak might quite possibly be intended to be assertive, especially if a controversy has already begun.

(ii) Similarly, flowing from the same point concerning the detrimental nature of the inaction, the first group of cases is more trustworthy in respect of the dangers relating to defective memory and perception.

Accordingly, Falknor concludes, the argument for admissibility is stronger in respect of the first group of cases than the second. For, he adds, "[n]o more than unimportant or trivial affirmative conduct, does mere silence, when not palpably detrimental or disserving to the silent individual, appear to represent sufficient avouchment of the actor's apparent belief to warrant more favourable treatment than that given the ordinary hearsay assertion."[144] The

learned author's full argument concerning the status of implied assertions generally, and silence particularly, will be discussed at a later stage.[145] It suffices at this point merely to take note of his view that the "silence" cases raise the same problems as the other instances of positive implied assertions, encounter the same hearsay dangers,[146] and pose the same questions concerning trustworthiness and admissibility.

F. The Identity Cases

There remains a series of cases which Weinberg[147] calls "identity" cases which do not fall into the categories already discussed. In R v Gibson,[148] the accused was charged with assaulting the complainant in the following circumstances: After a quarrel with the son of the local prosecutor at a public house, the accused walked towards his home along a street in which the prosecutor's house was situated. Meanwhile the prosecutor had also left the public house and was on his way home. On arriving at the entrance to his house, the prosecutor was struck on the head by a stone and severely injured. The accused was seen to enter his house immediately after the stone had been thrown, and, shortly before the stone had been thrown, he was seen to have come up behind the prosecutor and to have passed on the opposite side of the street. In his evidence, the prosecutor also said, "Immediately after I was struck by the said stone, a lady going past, pointing to the prisoner's door, said, 'The person who threw the stone went in there'."

The trial court admitted this evidence as tending to show identification, but on appeal the evidence was held to be patently inadmissible.

In Kenny's Outlines of Criminal Law,[149] the following submission appears in respect of Gibson's case:

> "If, however, the woman had been heard to say, as a man approached her, 'Hallo Mr Gibson, where are you going' it would clearly have been permissible for the witness to have repeated this remark, just as he could have deposed that he heard the woman scream, or shout 'shame' or saw her run away or the like.")

This passage meets with the following criticism by Cross:

> "I have no quarrel with the argument so far as the scream, the cry of shame and the flight are concerned, although I would like to know what fact is sought to be proved by them before finally pronouncing on their admissibility; but I think that the 'Hallo Mr Gibson' must be treated as an infringement of the hearsay rule if tendered on the issue whether Mr Gibson was present. 'Hallo Mr Gibson' means 'I recognize you Mr Gibson'. The remark is intended to be assertive to the same extent as, though less obviously than, 'The man who threw the stone went in there'."[150]

It is submitted that the exclusion of the evidence in Gibson's case was clearly correct. The statement was obviously intended to be assertive as to the identity of the stone-thrower and must be considered to be hearsay no matter which definition is employed. The case is nevertheless of interest in respect of the ensuing comments concerning the statement "Hallo Mr Gibson". Kenny's editor regards such statement as non-hearsay non-assertive conduct, much like a scream or flight. Cross on the other hand (correctly, it is submitted) considers the statement to be hearsay. How-

ever, the learned author concludes that the statement should be regarded as the functional equivalent of the express assertion "I recognize you Mr Gibson." With respect, it seems as if this argument is erroneous. The declarant did not say expressly "I recognize you Mr Gibson", nor did he necessarily intend to make such an assertion. The only way such identification can be ascribed to the declarant is by implication. He did not intend to identify Mr Gibson, but merely to greet him, just as the writers in Wright's case did not intend to vouch for Marsden's sanity, but merely to communicate with him. Any objections, therefore, which Cross has to the reception of the statement "Hallo Mr Gibson" must therefore, it is submitted, add fuel to the argument that implied assertions be regarded as hearsay.

The leading case on the topic of implied assertions of identity is that of Teper v R.[151] On a charge of arson of his shop, T raised the defence of an alibi. The only evidence to contradict this was that of a policeman who testified that on approaching the shop about twenty-five minutes after the fire began, he overheard a woman in the crowd shout out to the driver of a passing car (who bore a resemblance to T), "Your place burning and you going away from the fire." This evidence was admitted by the trial court, but the Privy Council held that it had been wrongly received as it infringed the rule against hearsay. As Cross[152] points out, "[t]he woman did not intend to tell anyone that Teper was present, but the Crown relied on her statement as equivalent to the assertion of that fact." This quality of non-assertiveness, although reducing considerably the dangers concerning

sincerity, leaves intact the dangers relating to the accuracy of the woman's powers of perception, which, as Weinberg [153] suggests, is surely a matter for cross-examination.

Conclusion: The judicial melange that has followed upon the decision in Wright v Doe d Tatham [154] has done little to resolve the conceptual problems surrounding the hearsay rule. Finman [155] puts the matter well: after considering Baron Parke's example of the sea captain who, after examining his ship embarks on a voyage with his wife and children, [156] he looks at the subsequent case authority and concludes as follows:

> "The judicial opinions contain little critical analysis and less indication of the factors motivating decision.... As a result those faced with the implied assertion problem find themselves, like our hypothetical sea captain, adrift in an unsettled sea." [157]

NOTES TO CHAPTER VI

1 Mark Weinberg "Implied Assertions and the Scope of the Hearsay Rule" (1973) 9 Melbourne University LR 268 at 273.

2 Ibid.

3 See pp 165 to 190 ante.

4 2 So. 764 (1887).

5 At 765.

6 223 P. 65 (1924).

7 Ibid.

8 158 N.W. 570 (1916).

9 See also, for instance, Goodlet v State 33 So. 892 (1903); Kemp v State 7 So. 413 (1890); Lindsey v State 93 So. 331 (1922); and State v Piernot 149 N.W. 446 (1914).

10 (1956) 94 CLR 470.

11 Rupert Cross "The Periphery of Hearsay" (1969) 7 Melbourne University LR 1 at 13.

12 Id at 13-14.

13 Supra note 10 at 487-8.

14 Judson F Falknor "Silence as Hearsay" (1940) 89 University of Pennsylvania LR 192 at 195.

15 Edmund M Morgan "The Hearsay Rule" (1937) 12 Washington LR 1 at 7-8.

16 Id at 8.

17 Falknor, op cit note 14, at 195.

18 Ibid.

19 John M Maguire "The Hearsay System: Around and Through the Thicket" (1961) 14 Vanderbilt LR 741 at 760.

20 Ibid.

21 Ibid. Maguire quotes from Wigmore Evidence I 3ed (1940) paras 32 and 38.

22 See the cases cited by Maguire, op cit note 19, at 760 note 59.

23 Id at 762.

24 Ibid.

25 Id at 763.

26 Id at 766.

27 Id at 767.

28 Ibid.

29 42 NY (Sup) 896 (1896).

30 At 897.

31 117 P. 673 (1911).

32 At 676.

33 133 N.E. 201 (1921).

34 Edmund M Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harvard LR 177.

35 Id at 215.

36 Ibid.

37 Id at 191.

38 These dangers are discussed at pp 223-4 ante.

39 Falknor, op cit note 14.

40 Id at 207.

41 Ibid.

42 Ted Finman "Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence" (1962) 14 Stanford LR 682.

43 258 P. 2d 1016 (1953); see also Judson F Falknor in 1953 Annual Survey of American Law at 770-1.

44 258 P.2d 1016 (1953) at 1017.

45 Finman, op cit note 42, at 696.

46 Id at 697.

47 Ibid.

48 (1837) 7 Ad & El 313; 112 ER 488.

49 See Chapter V.

50 37 A. 384 (1897).

51 133 P. 307 (1913).

52 Ibid.

53 Maguire, op cit note 19, at 757.

54 Falknor, op cit note 14, at 206.

55 Ibid.

56 Charles T Mc Cormick "The Borderland of Hearsay" (1930) 39 Yale LJ 489 at 504.

57 Falknor at 206.

58 Finman, op cit note 42, at 692-3.

59 Id at 693.

60 Sir Rupert Cross Evidence 5ed (1979) 472; see the cases cited by the learned author in note 15.

61 (1881) 6 App Cas 489.

62 At 502.

63 Ibid.

64 Ibid.

65 The court was sitting as a Scottish court.

66 See Russell v Russell [1924] AC 687.

67 At 505.

68 (1885) 11 App Cas 1.

69 Per Willmer J in B v Attorney General [1965] P. 278; [1965] 1 All ER 62 at 69.

70 Supra note 68, at 10.

71 At 11.

72 At 9-10.

73 (1889) 42 Ch.D. 282.

74 At 291.

75 [1914] A.C. 733.

76 At 734.

77 Ibid.

78 At 740.

79 At 741.

80 Ibid.

81 At 748.

82 At 751.

83 At 752.

84 Edmund M Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harvard LR 177 at 210.

85 Ibid.

86 Ibid.

87 Id at 211.

88 Ibid.

89 Supra note 75 at 752.

90 Morgan, op cit note 84, at 211.

91 Ibid.

92 Id at 212.

93 Maguire, op cit note 19, at 777.

94 Per Lord Moulton at 752; quoted with approval in the Australian case of Nash v Commissioner for Railways [1963] S.R. (NSW) 357 at 360.

95 [1952] Ch 454; [1952] 1 All ER 1228.

96 [1952] Ch 454 at 478; [1952] 1 All ER 1228 at 1242.

97 Ibid.

98 Ibid.

99 Ibid.

100 Stanley A Schiff Evidence in the Litigation Process I (1978) 275.

101 (1933) 290 U.S. 96.

102 At 104.

103 Judson F Falknor "Silence as Hearsay" (1940) 89 University of Pennsylvania LR 192.

104 Id at 209.

105 Ibid.

106 (1900) 82 L.T. 347.

107 Per Farwell J at 349.

108 95 S.W. 656 (1906).

109 168 S.W. 977 (1914).

110 173 N.Y. Supp. 669 (1919).

111 181 N.Y. Supp. 637 (1920).

112 200 N.W. 922 (1924).

113 1 P. 2d 954 (1931).

114 At 957.

115 Falknor, op cit note 103, at 212.

116 Id at 211-2.

117 105 N.E. 2d 923 (1952).

118 55 A.2d 156 (1947)

119 168 N.E. 160

120 At 160.

121 105 N.E.2d 923 (1952) at 926-7.

122 Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 343.

123 Maguire, op cit note 19, at 765.

124 Weinberg, op cit note 1, at 281.

125 411 F. 2d 572 (1969).

126 At 573.

127 L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) 152. See, for instance, Slatterie v Pooley (1840) M & W 664, 151 ER 579.

128 Hoffmann and Zeffertt, op cit note 127, at 154-5.

129 Falknor, op cit note 103, at 209.

130 93 S.E. 435 (1917). See also Hinson v Morgan 36 S.E. 2d 266 (1945), a later North Carolina case which adopted the same approach. This latter case is discussed by Wallace C Murchinson in a note entitled "Negative Testimony - Silence as Hearsay" (1946) 24 North Carolina LR 274.

131 At 435.

132 32 S.W. 2d 513 (1930).

133 At 518.

134 4 P. 2d 244 (1931).

135 At 245-6.

136 Falknor, op cit note 103, at 213.

137 165 S.E. 560 (1932).

138 62 S.W. 2d 519 (1933).

139 At 522.

140 4 S.E. 2d 60 (1939).

141 Ibid.

142 Charles T Mc Cormick "The Borderland of Hearsay" (1930) 39 Yale LJ 489.

143 Id at 504.

144 Falknor, op cit note 103, at 216.

145 See pp 333-8 post.

146 See Morgan "Hearsay Dangers ... ", op cit note 84, at 213, where the learned writer identifies the dangers inherent in this type of evidence.

147 Weinberg, op cit note 1, at 284.

148 (1887) 18 Q.B.D. 537.

149 19ed (1966) 500.

150 Rupert Cross "The Periphery of Hearsay" (1969) 7 Melbourne University LR 1 at 12.

151 [1952] AC 480.

152 Rupert Cross "The Scope of the Rule Against Hearsay" (1956) LQR 91 at 94.

153 Weinberg, op cit at note 1, at 284.

154 1837 7 Ad & El 313, 112 ER 488.

155 Finman, op cit note 42.

156 1837 7 Ad & El 313 at 388.

157 Finman, op cit note 42, at 683.

Chapter VII

SOUTH AFRICAN CASES ON IMPLIED ASSERTIONS

The only South African case where the question of implied assertions has been considered at any length is S v Van Niekerk.[1] The facts of this case were as follows: The appellant had been convicted of theft by the court a quo on the ground that he, in his capacity as magistrate, had disposed of a gun belonging to X. The gun had been taken away from X by the police and handed to the appellant for safekeeping. A month or two later, he had sold the gun to a firearms dealer. The defence raised by the appellant was that X, who was a good friend of his, had authorized him to sell it, and later told him to keep the proceeds. X subsequently died, but, in order to rebut this defence, the prosecution tendered two letters written by X to his brother, one a month before and the other two months after the sale of the gun by the appellant. The material portions of these letters read as follows:

> "Hallo James, ...
>
> Man en moenie vergeet om my haelgeweertjie by die Polisie stasie te gaan haal nie hoor ...
>
> Mike." [2]

> "Hullo Jamsie, ...
>
> James hoor hier, daardie haelgeweertjie wat by die magistraat is, saam met 'n box patrone, het ek vir hom gesê moet hy aan jou oorhandig. Nou ja ou broer kry dit asseblief by hom en hou dit by jou totdat ek eendag weer terug kom. Ek wil nie my enkele ou besittings wat ek nog oor het, wyd en suid versprei sien nie, ...
>
> Van Mike." [3]

No objection was raised to the admission of these letters at

the trial, and they were admitted. On appeal, however, it was contended that they were of the nature of hearsay and should have been excluded. The court considered the statements of the hearsay rule set out in Phipson [4] and in R v Miller,[5] and concluded as follows:

> "In the present case the enquiry was whether or not the accused had authority to sell the gun and the two letters were tendered to prove that he did not. Had the letters contained a direct assertion that the accused had no such authority there could have been no doubt that they would have been inadmissible, but they do not do so. In the first letter the deceased merely requests his brother to fetch his gun at the police station, and the second letter contains a request to collect it from the accused and also a statement that he, the deceased, had told the accused to hand it over to him. In other words, it is only by way of implication that the deceased says that he did not give the accused authority to sell the gun. Does this make any difference to the admissibility of the statements? In principle I can see no reason why it should, save possibly for the fact that a person who wishes to mislead by making a wilfully false statement about a particular matter is less likely to do so in an indirect way than in a direct way. We are dealing here with the type of statement classified by Cross in his book on Evidence at p. 353 as:
>
> > 'Statements which were not primarily intended by their maker to be assertive of the fact they are tendered to prove.'
>
> Such statements are, in his opinion, inadmissible because they offend against the hearsay rule just as much as those which are intended by the maker to be assertive of the fact they are tendered to prove. The case of Teper v. R., 1952 A.C. 480, is, I think, authority for this view." [6]

The court then considered the views of Hoffmann [7] in this regard, observing that while the learned author appeared to take the same view concerning non-assertive statements, he seemed to be more doubtful as regards non-assertive conduct, a topic on which the court declined to comment. The fol-

lowing passage was however quoted with approval:

> "If someone goes to his attorney and says 'Please issue a summons against X claiming R500', he is not expressly stating any facts. The statement is an item of conduct from which one can draw the inference that he thinks that X owes him R500. If his state of mind on this subject is a fact in issue, for example, if the question is whether he knew he was insolvent, his statement would be admissible to prove that he thought he was entitled to the money. But there is no doubt that the statement could not be used to prove that the R500 was actually owing. Phipson would say that the evidence would be excluded because it is irrelevant, but there is authority for the view that its use for this purpose would infringe the rule against hearsay." [8]

It was further contended for the prosecution that the letters should be received as original evidence to show the deceased's state of mind, i e his belief that he had not authorized the accused to sell the gun, and that this state of mind should be used as inferential proof that no authority had in fact been given. This argument was, however, rejected, the court invoking the views of Wigmore [9] that to permit the conduct or utterances of a person to be used as a second step of inference to some other fact, which forms the ultimate object of proof, would amount to an evasion of the hearsay rule. As regards those cases where this process of double inference has been permitted by the courts, it was held [10] that these were "specially recognised exceptions of long standing". These exceptions related to "marriage as evidenced by conduct or habit, legitimacy as evidenced by parents' conduct, identity as evidenced by belief of family history, and testamentary execution as evidenced by the testator's belief and declarations." [11]

Academic response to Van Niekerk's case has been mixed:

Schmidt [12] expresses unequivocal opposition and dissatisfaction with the decision, giving the following reasons for his opinion:

(i) Implied assertions, he argues, do not contain the same degree of potential danger as express assertions. Referring to Cross, [13] he submits that just as people do not say 'Hello X' in order to deceive passers-by into thinking that X is there, in the same way a person does not write to his brother asking him to collect his gun so as to deceive people into thinking that he has not given it to another.

(ii) Sufficient safeguards are present in the form of the opinion rule and the general requirement of relevance.[14]

(iii) The hearsay rule, in principle, should be restricted as far as possible, as it limits the sources of information open to the court; in those areas where uncertainty prevails concerning the scope of the rule, the courts should incline towards admissibility.

(iv) An extension of the exclusionary rule to cover implied assertions would create greater inconsistencies than a curtailing of its scope, resulting in the exclusion of evidence such as that considered in the categories discussed in the preceding chapter (e g flight cases, treatment cases etc).

(v) There are very few precedents for extending the hearsay ban in this manner, and those cases which do support it are unconvincing and may be explained on the grounds of relevance and the opinion rule. Furthermore, the paucity of case law on this subject would seem to indicate that such evidence is received without objection. In addition, the case of S v

Qolo,[15] he argues, must be seen as Appellate Division authority against so extending the hearsay rule. He does concede, however, that Qolo's case is not strong authority for this contention, as the court did not expressly apply its mind to the question of implied assertions.

(vi) The letters in Van Niekerk's case should have been received on the basis that they contained an order to the deceased's brother, and this instruction, the learned author argues,[16] was a relevant fact.

(vii) Schmidt concludes, therefore, that the exclusion of implied assertions as hearsay is not part of South African law. In support of this contention, he cites several cases in which, he submits, evidence of a similar nature has been admitted on the basis that it constituted relevant circumstantial evidence. These decisions include R v Alexander[17], Lenssen v R[18], R v Steyn[19], R v Boardman[20], and Van der Harst v Viljoen[21]. On the strength of cases such as these, he adds, implied assertions in South Africa will be received or rejected depending on their relevance.

It is respectfully submitted that the following criticism may be levelled at Prof. Schmidt's argument, taking each of his seven points in turn:

Ad (i) This observation is not always true. As has been pointed out, the danger of insincerity may sometimes be reduced in the case of an implied assertion, but this is not necessarily so. Furthermore, the dangers relating to memory and perception remain normally unaffected, while the possibility of ambiguity or misinterpretation may often be

greater than in the case of express assertions. Implied assertions may also raise additional dangers that are not in question when considering express assertions.

Ad (ii) The opinion rule alone is not sufficient for determining the admissibility of such evidence, as the opinion rule and the hearsay rule operate on different levels. The opinion rule is related to the principle of relevance (at least according to Wigmore [22] and the South African Appellate Division in R v Vilbro [23]) in that it serves to exclude supererogatory opinion that is unable to assist the court. The hearsay rule, on the other hand, is related to the principle of reliability. An implied assertion concerning the opinion of an absent actor or declarant may, therefore, in the abstract, be sufficiently relevant to assist the court, but, nevertheless, be insufficiently reliable as regards its latent hearsay dangers to warrant admissibility. A distinction of this kind, however, may be rather artificial, and it is only when the two exclusionary rules are working in harness that a satisfactory answer may be found to the question of admissibility.

What about the learned author's contention that the problem of implied assertions may be adequately handled by recourse to the normal criteria of relevance? The answer to this question depends on the meaning to be attributed to the word 'relevance'. If, by 'relevance', Prof. Schmidt means logical relevance or probative force of the evidence, i e its natural and ordinary sense, then the contention must be rejected, as such a criterion takes no account of the hearsay dangers or

prejudice caused to the adversary by the absence of the opportunity to cross-examine the declarant or to avail himself of the other standard procedural safeguards. If, however, he intends the word to encompass 'legal relevance', a term which Hoffmann and Zeffertt[24] consider to be a function of both probative force and the extent to which the evidence is, for one reason or another, undesirable, then the point made by Prof. Schmidt is arguable. In the latter case, it could be argued, the concept of 'legal relevance' is sufficiently wide to include an enquiry into the hearsay dangers and the prejudice caused to the adversary as part of the investigation into whether the disadvantages of receiving the evidence exceed its probative value. This approach, however, although theoretically valid, would have the undesirable effect of confusing the two exclusionary rules. What merit is there in shifting this enquiry out of the province of the hearsay rule, where it really belongs, into the field of relevance, where it fits somewhat artifically, when the basic enquiry under either rule remains essentially the same?

Ad (iii) and (iv) It is readily conceded that on the present state of the law these suggestions have some merit in that they would in some cases curb the excesses of the over-rigid hearsay rule. These arguments would, however, fall away if our law were to recognize that labelling an item of evidence as hearsay does not solve the question of admissibility, but merely states it. If, moreover, our hearsay law is to be reformed - a step which seems inevitable - it would be better to reform the law along the uniform lines already suggested rather than establishing dual principles of admis-

sibility for express and implied assertions.

Ad (v) The paucity of case law on this topic, it is submitted, reflects nothing more than a failure on the part of our courts to identify properly the problem of implied assertions. Qolo's case (which is discussed at length below)[25] is of little assistance, as at no stage did the court even recognize the true nature of the problem, let alone conduct an analysis of the hearsay question. Van Niekerk's case, on the other hand, represents the only instance where our courts have at any length investigated the problem, and to regard this decision as "unconvincing" or as explainable on the basis of the rules concerning opinion and relevance is, it is submitted, unjustifiable.

Since the publication of the second edition of Schmidt's book, moreover, our courts have again considered the question of implied assertions, and seem to have regarded it as almost trite law that implied assertions do fall within the scope of the hearsay rule. This was the decision of the Eastern Cape Division in Kroon v J L Clark Cotton Co (Pty) Ltd[26], where the facts were as follows:

The defendant, a company dealing with the production and processing of cotton, had recommended to the plaintiff a product called 'Treflan' for the control of certain types of weeds when planting cotton. The plaintiff applied this product according to the manufacturer's specifications, but found it to be ineffective. On complaining to one of the company's employees, M, who had originally recommended the product, the plaintiff was referred to one B, an employee and technical

representative of the manufacturers of 'Treflan'. In an action for damages resulting from alleged damage to the plaintiff's crop, B was not called upon to testify. The plaintiff himself, however, gave the following evidence: After he had lodged a complaint, B came to inspect the crop. He was taken to the cotton fields by the plaintiff and his wife, and expressed surprise at the lack of control that he saw. He accepted that the weeds should have been controlled by 'Treflan', and did not suggest that the plaintiff's weed problem was due to weeds which 'Treflan' was not supposed to control. Nor did he claim that the weeds which 'Treflan' was supposed to control were within normal, acceptable limits. At no stage did B accuse the plaintiff of the incorrect application of the product, and, in an apparent attempt to appease the plaintiff, he even offered to apply 'Treflan' to the plaintiff's lands the following season without charge.

The admissibility of this evidence was challenged on the ground that it amounted to hearsay. The form of the objection, in the words of Smalberger J, was as follows:

> "The defendant contends that the evidence of the statements made by Bennie was tendered as proof of the fact that Treflan did not work, and therefore hearsay and inadmissible. At the very least it was claimed, the statements by Bennie amount to an implied assertion that Treflan did not work, and that the purpose of such evidence was to prove that Bennie's views were correct in this regard. Relying, inter alia, on Hoffmann and Zeffertt South African Law of Evidence 3rd ed at 101, it was argued that such statements on this basis too were hearsay and inadmissible." [27]

In response to this objection, the learned judge held as follows:

> "Prima facie the evidence of the plaintiff ... concerning Bennie's statements amounts to hearsay and should therefore be excluded unless there is some other evidential basis on which such statements can be admitted in evidence. To my mind the basis for such admissibility is to be found, having regard to the facts of the present matter, in the principle that
>
> > 'when a party refers to a third person for information or an opinion on a given subject, the information or opinion so given is receivable against the referer as an admission'.
>
> (Phipson on Evidence 12th ed para 745.) This appears to be an accepted principle of our law (Van Rooyen v Humphrey 1953 (3) SA 392 (A) at 397-8: Hoffmann and Zeffertt (supra at 165); Schmidt Bewysreg at 380). See also in this regard Cross on Evidence 5th ed at 524 and Halsbury's Laws of England 4th ed vol 17 para 74." [28]

The evidence was, therefore, held to be hearsay but nevertheless admissible by way of an exception to the rule, in that the words and conduct of B constituted a vicarious admission made by a referee which may be proved against the referer.

What conclusions may be drawn from this decision about the status of implied assertions in South African law? The court, unfortunately, did not analyse the question at any length, but it is submitted nevertheless that the conclusion of the learned judge was correct. The significant aspect of the decision was that all the evidence of the plaintiff concerning B's statements was labelled hearsay, despite the fact that such evidence comprised three distinct components:

(a) The evidence that B "was surprised at the lack of control he saw, and accepted the weeds should have been controlled by 'Treflan'". Although it is not entirely clear from the judgment exactly how B expressed his

surprise and acceptance of this lack of control, it would seem that this evidence probably constitutes an express assertion, i e B's statements were probably tendered to prove the truth of their content, although it is possible that his reaction was inferred from his general attitude and facial expressions, in which case the evidence would constitute an implied assertion.

(b) The fact that B neither suggested that the plaintiff's weed problem was due to weeds which 'Treflan' was not supposed to control, nor claimed that the weeds which 'Treflan' should have controlled were within normal limits, nor accused the plaintiff of the incorrect application of 'Treflan'. This is a classic example of hearsay by silence or non-assertive non-conduct, similar in nature to those discussed in Chapter VI above.[29]

(c) The offer by B to apply 'Treflan' to the plaintiff's lands the following season without charge. This is an implied assertion or non-assertive positive conduct, as the evidence is not tendered to establish the truth of what B asserted, but rather to support an inference that B accepted that 'Treflan' had not successfully controlled the plaintiff's weed problem.

Despite these differences in form, the court, without question, held the evidence <u>in toto</u> to be hearsay. Nor may it be alleged that the court did not identify the question of implied assertions, as the learned judge expressly raised the question at 206 F_1 above. The only inference that can be drawn, therefore, is that the learned judge considered it to be almost self-evident that implied assertions, whether in

the form of non-assertive positive or negative conduct, are, in our law, within the scope of the hearsay rule. The fact that no authority was cited should not be allowed to detract from what is, logically, a faultless conclusion.

Of further interest in Kroon's case is the assessment by the learned judge of the weight to be attached to the evidence, where it was emphasized that it must be borne in mind that B's statements "although against the interests of his company and therefore presumably guardedly made, have not been tested under cross-examination".[30] This appreciation and evaluation of the hearsay dangers presented by the evidence is consonant with the more flexible approach that characterizes much of the American academic writing on implied assertions, and, as will be submitted later, forms the cornerstone of the broader perspective of hearsay that is required to extricate our law from its present untenable position.

Kroon's case, therefore, represents a strong rebuttal of Schmidt's view that implied assertions are not hearsay in South African law but are received or rejected according to their probative value. It would have been easy, if the court had felt constrained by Qolo's case, for the learned judge to have distinguished between the express and implied assertions in B's conduct, and to have held that the inadmissible verbal conduct in (a) had been substantially repeated in admissible non-verbal form in (b) and (c).

This distinction was made in S v Qolo,[31] a case which Schmidt[32] submits is Appellate Division authority - albeit not strong authority - for the proposition that the exclusion of implied assertions as hearsay does not form part of our law. The facts

of this case were as follows: V, a certain mine detective, noticed a man in front of the gate next door to his house. He saw that the man was covered in blood, and ran to his aid. On seeing that the man was seriously injured, he asked him what was the matter, whereupon he pointed with his finger towards a tree about 10 yards away and said "lo tsotsi". In the foliage, V saw the accused, and he instructed his son to bring the accused to him. His son did this, whereupon the injured man slapped the accused in the face. He subsequently died from stab wounds, and the accused was convicted of murder. On appeal, the question arose as to whether the evidence of the deceased's utterance and pointing out were admissible.

Williamson JA (with whom Steyn CJ and Wessels JA concurred) held that the pointing out, coupled with the remark "lo tsotsi" constituted hearsay evidence as regards the identification of the accused. He also found that there was no apposite exception to the rule which would render the evidence admissible. He nevertheless found that there was sufficient admissible evidence to uphold the conviction, stating:

> "In this case a somewhat unusual factor appeared. The inadmissible verbal exclamation, and its setting, was in reality thereafter repeated in a different form; I refer to the deceased's physical act of slapping the face of the appellant. That act, evidence of which was admissible, carried in fact the same evidentiary weight as the previous exclamation. In those circumstances it is very difficult to see how any possible prejudice could have been caused to the appellant in his trial by the irregularity. The body of evidence against him, apart from the inadmissible hearsay piece of evidence, was then just as strong as the body of evidence which included that hearsay." [33]

The court was prepared, therefore, without question and as if no doubt existed as to the correctness of its decision, to admit the evidence of the slap, while holding the pointing out and accompanying exclamation inadmissible. On what basis? Unfortunately the court did not give any reasons for this distinction, and seemed, with respect, oblivious of any hearsay qualities the former evidence might possess. If it were to be argued that the former evidence be received as being non-assertive conduct, while the latter be rejected as being assertive conduct and statement, then the following counter-arguments could be raised:

(a.) How can it be determined whether the deceased's conduct was intended to be assertive or non-assertive? The act of slapping the accused's face may have been motivated by any number of reasons: vengeance, anger, contempt, a desire to convince V of the firmness of his conviction that he was indeed his assailant. Is it not more realistic to recognize that human conduct is sparked off by a number of responses and stimuli, and that there may be many reasons for an act or statement, some motivated by a desire to assert and some purely personal?

It is submitted that a division of human conduct into two categories, viz assertive and non-assertive, apart from the difficulties of proof, may in many cases be impossible.

(b.) If the testimonial dangers inherent in the two types of evidence are compared, is there any substantial dif-

> ference? If the deceased was insincere in his pointing out of the accused and in naming him as the assailant, would not the same insincere motive have coloured his act of slapping? Even if it is assumed that the act of slapping was completely non-assertive, and was motivated purely by personal reasons (such as anger, contempt, frustration) as opposed to a desire to communicate, would not the same dangers relating to the quality of his memory and perception still render the evidence suspect? If the express assertions must be rejected on the ground that the deceased may erroneously have believed the accused to have been his assailant, must not the implied assertion also be rejected on the same ground? Is not the need for and utility of cross-examination not equally great in such a case?

In the light of these strong objections, and the failure of the court to consider the matter at any length or to cite any authority on the question, it may be argued, and even Schmidt himself has conceded, [34] that Qolo is a rather defective base on which to rest the general proposition that implied assertions are non-hearsay. On the other hand , the unquestioned acceptance by the Appellate Division seems to indicate that in South Africa the matter may be regarded as so clear in our practice as not to merit consideration. [35] If that be so, then, it is submitted, South African practice has failed to identify the hearsay problem, and, consequently, the possible hearsay dangers that sometimes arise out of this unquestioned acceptance.

Ad (vi) Schmidt's sixth contention warrants close examination, as it brings into question the tenuous distinction between implied assertions and original circumstantial evidence. His argument is that the letters in Van Niekerk's case should have been received as they contained an order to the deceased's brother, which order constituted a relevant fact. Is it not arguable, then, that this is relevant circumstantial evidence of the fact that the deceased had not authorized the accused to sell the gun? Prof. D T Zeffertt,[36] commenting on the exclusion of implied assertions in Wright v Tatham and S v Van Niekerk, stated that he found it "almost impossible to distinguish those statements that are excluded on this basis and those that are admitted as circumstantial facts for non-hearsay purposes".

It is submitted that, as the learned writer intimates, this distinction is in many instances difficult to draw, in that the courts in practice admit many implied assertions in the guise of 'circumstantial evidence'. A case that illustrates this problem is Levin v Barclays Bank D.C.O.[37] : The defendant had signed a deed of suretyship securing the indebtedness of A & H trading in partnership under the name of Andave Estate. The plaintiff Bank sued him for the amount owing in terms of this deed, whereupon the defendant raised the defence that a partnership did not exist between A and H as alleged by the plaintiff. Evidence was tendered by the manager of the plaintiff which showed the following: that an account was opened with authority to A and H or both to sign cheques on behalf of the partnership; that they operated on that account in the name of the partnership; that they submitted state-

ments of affairs and balance sheets of the partnership; and that they arranged for overdraft facilities for the partnership. In the court a quo, judgment was awarded to the plaintiff, the court holding that there were sufficient facts to support the contention that A and H were trading in partnership. On appeal, the defendant argued that the above evidence was hearsay and should have been excluded.

The court held, however, that the evidence had been properly admitted and did not infringe the hearsay rule. The reasoning of Potgieter JA (in whose judgment Beyers, Botha, Williamson and Wessels JJA concurred), may be summarized as follows: The evidence of the conduct of A and H was not relied upon as conduct equivalent to an assertion that they were trading in partnership; if such were the case, it may well be inadmissible. It was merely relied on to establish that A and H had opened a partnership account with the Bank, that they had operated on the partnership account on behalf of the partnership for some years, that financial statements reflecting the partnership's activities had been submitted, and that overdraft facilities had been arranged for the partnership. To establish these facts, the evidence, it was held, is clearly non-hearsay and receivable as the best evidence of those facts. From these 'independent facts', the court held, a proper inference may be drawn by the court that the parties were in fact trading in co-partnership.

This reasoning has, however, been criticized by Jean Davids[38] as being "open to doubt". She submits that

many examples of indirect hearsay can be viewed merely as a species of circumstantial evidence thereby evading the rule against hearsay. However, she adds,

> "to treat ... the joint conduct of financial affairs in Levin's case as merely an evidential fact from which an inference can be drawn, does not meet the objection. The hearsay rule must surely be regarded as constituting a limitation on the admissibility of circumstantial evidence ..." [39]

The learned writer further considers that it may have been argued that the fact that the two persons conducted business as partners was the very fact in issue, and the evidence of the bank manager was direct evidence of that fact. However, she again rejects this argument on the ground that

> "partnership is a contract, express or tacit, and the behaviour of the parties only provides the material from which the existence or otherwise of the agreement can be deduced. Since their direct assertion that they had entered into such an agreement was clearly hearsay, it would seem to follow that their conduct would also be." [40]

She concludes therefore that the evidence was hearsay, and that the only way it could be admitted was by way of an exception to the rule (e g statements accompanying and explaining a relevant act).

It is submitted that these remarks have considerable merit : Certainly it would seem that the hearsay rule constitutes a limitation on the admissibility of circumstantial evidence, just as it does with regard to direct evidence. The classification of evidence as 'circumstantial' is no logical basis for considering it to be non-hearsay. To give an example cited by Jean Davids, the placing of X's body in a mortuary van by a doctor, if testified to by W, is circumstantial evidence of the fact that X was dead at the time,

but, being equivalent to an assertion by the doctor to that effect, must be considered hearsay. To argue that the state of mind of the doctor be used as an independent fact serving as inferential proof that X was in fact dead, would be to render nugatory the effect of the hearsay rule (see Wigmore [41] and S v Van Niekerk [42] supra). It is nevertheless submitted, however, that there is one important feature which distinguishes Levin's case from Van Niekerk's case and the example cited by Jean Davids, and this lies in the fact that the enquiry in Levin's case concerned the existence of a contract. The question facing the court was simply : was there a partnership agreement between A and H? In this regard, our law employs an objective approach, [43] which has been stated by the Appellate Division thus:

> "The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract." [44]

In Levin's case, therefore, the conduct of A and H is relevant to the enquiry irrespective of the working of their minds, or, to use Tribe's formulation, the 'trip' from A to C on the testimonial triangle may be completed without the need of a detour via B, the belief of the absent declarant. The evidence is, therefore, it is submitted, non-hearsay, and was correctly admitted in Levin's case.

As regards the relationship between circumstantial evidence

and the hearsay rule, therefore, it is submitted that the following principle should be applicable: Extra-curial statements or conduct from which a fact is inferred, whether they were intended by their author to assert that fact or not, should not be considered original circumstantial evidence of that fact unless that statement or conduct enjoys a sufficient degree of relevance regardless of the actor's/declarant's state of mind or belief.

The solution to the problem of distinguishing between implied hearsay assertions and non-hearsay circumstantial evidence, therefore, lies in the recognition of the following two facts:

i. A distinction should be drawn between two types of circumstantial evidence, viz evidence where the inference drawn rests for its validity on the belief or credibility of the absent actor/declarant, and evidence where the inference may be drawn without regard to these factors. If, for instance, a witness were to testify that he saw the captain of a ship conducting a thorough investigation of his vessel before embarking on a voyage with his family, then, in order to draw the inference that the captain considered the ship to be seaworthy, reliance would have to be placed on the captain's untested belief to that effect. If, however, a witness in a criminal trial for murder were to testify that he saw the accused coming out of the victim's house with a bloodstained dagger, then the inference that the accused stabbed the victim could be drawn without considering the accused's belief. The first item of evidence would therefore be hearsay circumstantial evidence of the inference

drawn, whereas the second item would be non-hearsay circumstantial evidence. Put another way, where circumstantial evidence of verbal or non-verbal conduct derives its evidential value from the untested belief of the absent actor or declarant, then it is incorrect to speak of a "non-hearsay circumstantial use" of that evidence. The problem identified by Prof. Zeffertt seems to have arisen out of a tendency on the part of the courts to regard the term 'circumstantial' as antithetical to the term 'hearsay' instead of 'direct'. The fact that evidence is circumstantial, as opposed to direct, and therefore relies for its evidential value on the drawing of an inference, does not in any way render it immune to the hearsay ban. It must be recognized that circumstantial evidence, in the same way as direct evidence, may be construed in either a hearsay or a non-hearsay sense, depending on whether the inference drawn brings into question the untested credibility of an absent actor or declarant.

ii. As has already been mentioned, the recognition of the hearsay nature of an item of circumstantial evidence should not be regarded as solving the problem of admissibility, but merely as stating it. If this were not the case, the courts would be forced to reject much reliable and valuable evidence on the ground that it was 'hearsay-like' despite strong circumstantial guarantees of reliability.

Returning to Schmidt's contentions in respect of Van Niekerk's case under point (vi), it is submitted that the following comments may be made:

a. The letters written by the deceased to his brother do

constitute relevant circumstantial evidence on the issue of whether the deceased had authorized the accused to sell his gun.

b. The letters do not, however, possess any evidential value unless reliance is placed on the deceased's untested belief.

c. The evidence is, therefore, hearsay circumstantial evidence.

d. Despite its relevance, it must, therefore, on the present state of our law, be excluded unless an appropriate exception to the hearsay rule may be found to rescue it.

e. The evidence would seem to possess sufficient circumstantial guarantees of reliability to warrant its admissibility; as Schmidt [45] observes, one does not write to one's brother asking him to look after one's gun in order to create the false impression that one had not donated the gun to a third party.

f. Yet, on the present state of our law, the judicial officer, after correctly labelling the evidence as hearsay, would not be entitled to receive the evidence on this basis (unless, of course, an exception to the rule is found).

g. This fact has forced the courts to label implied assertions of this kind as non-hearsay circumstantial evidence, so as to receive what in many cases is valuable testimony.

h. This has resulted in a further blurring of the distinction between circumstantial evidence and implied assertions, and further confusion on what constitutes

hearsay.

i. Our law has therefore reached the point where the need for reform can no longer be ignored.

Ad (vii) Schmidt, finally, cites several cases where, he submits, evidence of a kind similar to that excluded in Van Niekerk's case has been admitted as relevant circumstantial evidence. These cases merit closer examination in order to investigate what impact, if any, they make on the law regarding implied assertions:

(1) R v Alexander: [46] The accused was charged with illicit sale of liquor, and the evidence showed that certain detectives, when they entered a room where the alleged sale took place, heard the accused's wife giving a warning that there were detectives about. This evidence was admitted, as the suspicious circumstances which the detectives found on entering the room, such as the fact that the premises were closed and that four men were being served with liquor, were sufficient to "render the evidence with reference to the wife's statement admissible." [47] It was held that the evidence was not hearsay. This conclusion is criticized by Lansdown and Campbell, [48] a criticism with which, it is submitted with respect, it is difficult to disagree, especially in the light of the following mis-statement of the hearsay rule:

> "Hearsay evidence is where a person states something which he has heard from someone else with regard to something which has occurred elsewhere. The point in this case is not that the detectives stated that Mrs Alexander told them something which had occurred elsewhere, but that they stated that she, in their hearing, made a statement warning the accused of their presence." [49]

According to this definition, even an express assertion by the

accused's wife to the effect that scouts had been posted to warn the offenders would be non-hearsay and admissible. It seems, anyway, that Bristowe J considered the statements admissible as being vicarious admissions by an agent.[50]

(2) Lenssen v R:[51] The accused was charged with illegally keeping a gaming house, and evidence was tendered of certain conversations which had been overheard by police constables. These remarks and observations were made by people as they were entering and leaving the house, and the court held that they were admissible, either as part of the res gestae or as statements of intention relating to their acts of going into the house.

To regard this case, as Schmidt does, as authority against extending the hearsay rule to cover implied assertions would, it is submitted, be somewhat dangerous. The question of implied assertions was not even raised, let alone examined, and the resort to the res gestae, which Wigmore[52] calls a "vicious element in our legal phraseology" which, by its ambiguity "invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both", does little to resolve the hearsay issue. Was the evidence received as original evidence or as an exception to the hearsay rule? The answer is certainly not clear, but the reference to statements of future intention, which are possibly a hearsay exception,[53] would certainly militate against a firm view one way or the other.

(3) R v Steyn[54] : The accused was charged with fraudulent

insolvency, and one of the issues to be determined was whether a certain A had, under a hire-purchase agreement, sold a motor-car to the accused or to B. Evidence was tendered of an agreement between A and C in terms of which A was to hand over the car to the accused upon payment of the balance of the purchase price together with certain other accounts. Evidence of this agreement was held to be admissible, but only to prove that there was a contract in those terms, not to prove any facts inferred from its terms. In the words of Gutsche J:

> "Supposing the evidence now tendered were to amount to this: That Kirkup contracted to surrender his rights to the car provided the accused or his estate would pay the balance of the purchase price together with what was due for spare parts and also for work done on the car; in such a case evidence of that fact would be admissible to prove that there was a contract in these terms, but it would not be admissible to prove, for instance, that the purchase price was in arrear or that spare parts had been sold and had not been paid for or that work had been done on the car and not been paid for. The whole purpose is not to prove the contents of the contract but that the contract in particular terms was made, and so far I think the evidence is admissible." [55]

This conclusion, far from conflicting with the principle in Van Niekerk's case, would seem to support it. Thus, irrespective of A's state of mind, the evidence of the agreement, containing a term whereby A was to hand over the car to the accused in return for certain consideration, was sufficiently relevant on the question of the identity of the buyer to warrant its reception as original circumstantial evidence.

(4) R v Boardman: [56] The instructions which a police detective had given to certain traps were held not to be hear-

say, a fact which Schmidt submits supports his contention regarding implied assertions. However, the basis of this decision was that a statement made by a person who is a witness in the proceedings cannot be hearsay,[57] a view that has not been received with universal acclaim.[58] In an obiter dictum, however, Marais J added[59] that the evidence, moreover, could not be hearsay, as it was not tendered to prove the contents of the instructions, but merely to prove the fact that an instruction was given with a specific object.

In order to assess the validity of this dictum, it is necessary to consider the factual background of the case. The accused had been convicted in a magistrate's court of buying two uncut diamonds from two police traps for £100. It was common cause that one of the traps was found with the accused's money in his possession and that the diamonds at that stage were still in the possession of the other trap. Two versions were presented to the court, however, as to how this state of affairs was reached; one by the trap, to the effect that the accused had given over the money voluntarily by way of the purchase price, and one by the accused, to the effect that the trap had forcibly taken the money from him. At this stage, the police detective was asked by accused's counsel what instructions he had given the traps. The magistrate disallowed the question on the ground that the answer would be hearsay.

It is clear that the purpose for asking this question was to elicit an answer that would tend to confirm the accused's version of the facts. The fact that instructions X were

given instead of instructions Y would perhaps make the accused's story more probable. For this purpose, the evidence is not hearsay, as it does not depend for its evidential value on the credibility of the police detective. There is therefore nothing in this decision that conflicts with the principles enunciated in S v Van Niekerk.

(5) Van der Harst v Viljoen:[60] In a paternity action, evidence of a letter written by the mother of the child to X was admitted as tending to show that she genuinely believed X to be the father of the child. In the words of Watermeyer J[61], "[i]t is not the type of letter that one would have expected a woman to write who was trying to father her child upon an incorrect third party". This letter was received without question, and the hearsay problem was not even considered, despite the fact that the letter clearly rests for its evidential value on the credibility of its writer. It is clearly, therefore, an implied assertion which falls squarely within the borders of the rule laid down in Van Niekerk's case. A basis for admissibility can, however, be found: as has been pointed out above,[62] the courts seem to regard implied assertions concerning marriage, paternity and testamentary documents as being admissible by way of an exception to the hearsay rule.[63] This question will be considered further, and at this stage it suffices to make the following observations concerning Van der Harst v Viljoen:

1. The court did not identify the hearsay problem at all, and it is therefore dangerous to rely on this case as authority for any contention, either in favour of the

admission of implied assertions or against it.

2. The evidence in this case, it is submitted, was hearsay, but nevertheless correctly admitted by way of an exception to the hearsay rule.

It is respectfully submitted, therefore, that Prof. Schmidt's contentions are not strongly supported by the authority he cites. It would seem, moreover, that the learned author has conceded the point, for, in the second edition of Bewysreg,[64] he concedes that the problems in connection with implied assertions necessitate a modification of the definition of hearsay laid down in Estate De Wet v De Wet,[65] where Watermeyer J defined hearsay as "evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement". Schmidt's modified definition is as follows: "getuienis van 'n mededeling deur 'n nie-getuie wat aangebied word om dit wat die nie-getuie wou meedeel as waarheid te bewys."

Van Niekerk's case, however, has drawn criticism from other South African writers, including A J van Wyk[66] and J C Ferreira.[67] Both writers espouse the strictly assertion-oriented definition of hearsay laid down by Watermeyer J in De Wet's case, and both express their approval of the following dictum of Botha J in Lornadawn Investments (Pty) Ltd v Minister Van Landbou:

> "As oënskynlike hoorsê-getuienis aangebied word vir 'n ander doel as om die waarheid van die inhoud daarvan te bewys, dan word dit nie getref deur die hoorsê-reël nie, en dan is sulke getuienis toelaatbaar indien die ander doel waarvoor dit aangebied

> word relevant is tot die geskilpunte in die saak." [68]

And further:

> "die hof [moet] die aard van die getuienis oorweeg in die samehang van die saak as geheel en tot 'n beslissing kom of die getuienis, objektief gesproke, relevant is tot enige van die geskilpunte in die saak, op 'n grondslag anders as dat die inhoud daarvan die waarheid is. As die antwoord op hierdie ondersoek bevestigend is, dan is die getuienis toelaatbaar vir die besondere doel wat dit relevant maak afgesien of dit die waarheid is of nie, en die blote feit dat dit terselfdertyd op 'n ander grondslag ook ter sake sou wees indien dit as die waarheid beskou word, kan dit nie ontoelaatbaar maak nie." [69]

In line with this approach, they argue, the letters in Van Niekerk's case should have been admitted, not in order to prove their contents, but as mere circumstantial evidence to support a relevant inference in conjunction with the other evidential material before the court. The shortcomings of the assertion-oriented definition, and the flaws in the argument concerning 'circumstantial evidence' have been discussed at length already, and need not be repeated here. It is submitted that the views of Van Wyk and Ferreira, although they find substantial judicial authority, reflect a somewhat over-simplified perspective of the hearsay dilemma. Van Wyk's view, moreover, that evidence is hearsay if it is relevant only when offered to prove the truth of its contents, and non-hearsay if it is relevant for another purpose, may lead to confusion and an incorrect application of the assertion-oriented formulation. Every hearsay statement, as has been pointed out above, enjoys a degree of relevance apart from that derived from its use to prove its contents. This lies in proving the declarant's state of mind, which is

sometimes used as the basis for drawing a further relevant inference, viz. a fact to which that state of mind points. This approach, as Wigmore [70] observes, would lead to a circumvention of the hearsay rule which is logically unjustifiable.

At the other end of the spectrum, Van Niekerk's case finds implied approval in the views of Prof. G L Peiris,[71] who makes the following comments:

> "Modern law makes no distinction ... between statements which are intended by their maker to be expressly assertive, and those intended to be assertive by implication, of the fact they are tendered to prove. The only difference in principle between these categories of statement is that 'a person who wishes to mislead by making a wilfully false statement about a particular matter is less likely to do so in an indirect way than in a direct way.' [State v Van Niekerk 1964 1 SA 729 at 733 per Watermeyer J]. This is, however, a question of degree, and it is clear that both categories of statements are generally excluded on the ground that they infringe the rule against hearsay." [72]

This view is certainly more in line with the subsequent decision in Kroon's case, and, it is submitted, reflects the sounder theoretical view. The objection that this view could lead to an unwarranted rejection of valuable and reliable evidence is met by the learned writer's qualification that an assessment of such reliability is "a question of degree". If a court were to find sufficient guarantees of trustworthiness in respect of the possible hearsay dangers, then it should have a discretion to admit the evidence as an exception to the hearsay rule.

In contrast with Prof. Schmidt's unqualified condemnation of the decision in Van Niekerk's case, the views of L H

Hoffmann[73] reflect a mixture of guarded approval and cautious criticism. While remarking that the ruling was correct as a general proposition, and was in accordance with the decision in "the great case of Wright v Doe d Tatham",[74] he submits that several exceptions to this proposition have been developed by the courts. These exceptions, such as implied assertions of paternity, marriage or the making of a will, he submits, should have been examined by the courts to ascertain whether they represent isolated exceptions or whether they may be connected by some underlying principle to distinguish them from Wright's case. Hoffmann himself suggests that there is in fact a unifying feature about these exceptions, viz. that they "all involve implied assertions about what the maker of the statement himself has done or not done."[75] One is seldom mistaken, he argues, about whether one was married, had intercourse with the mother of an illegitimate child, or made a will, whereas an implied assertion about someone else's sanity (as in Wright's case) is more susceptible to error and thus less reliable. The evidence in Van Niekerk's case concerned an implied assertion relating to the writer's own affairs, and should, he argues, have been admitted. Instead the court adopted the approach of Wigmore, and treated the exceptions as a closed category of "traditionally accepted instances".[76]

It is respectfully submitted that criticism may be levelled at this argument on two separate levels: First, as a descriptive observation, Hoffmann's views may account for the cases concerning paternity, legitimacy and wills, but they are not in accordance with the only two South African cases

that have expressly raised the question of implied assertions. In both Van Niekerk and Kroon the courts have seemed to indicate that all implied assertions infringe the rule against hearsay, whether they relate to the declarant's (or actor's) own affairs or not. In the former case, the letters in question concerned the writer's own conduct; in the latter case, the conduct and non-conduct were tendered to establish a fact not connected with the actor's own affairs. Yet in both cases the evidence was considered hearsay and inadmissible in the absence of a recognized exception allowing for its reception. In neither case did the court distinguish between the classes of conduct identified by Hoffmann.

Secondly, as a prescriptive norm, it is submitted that this is a defective criterion for admissibility. The reasons the learned author advances for admitting implied assertions relating to the actor's own conduct are as follows:

(i) The danger of insincerity is reduced, as in the case in all implied assertions; in order to deceive, the actor/declarant would have had to stage a charade.

(ii) The danger of honest mistake is reduced; one is unlikely to be mistaken about whether one was married, fathered a child or made a will.

The first of these observations has already been assessed in the above discussion of Prof. Schmidt's views. The second point remains, therefore, to be considered. Is it accurate to state that an actor is always unlikely to be mistaken about his own affairs? Surely this is only the case if the

conduct is of importance to the actor? The examples cited by Hoffmann, relating to paternity, marriage and the making of a will, all concern acts which are of great importance to the actor, thereby providing substantial guarantees that the actor was not mistaken about the event to which his conduct points. Such guarantees are, however, not present in the case of conduct which is insignificant or trivial in the eyes of the actor. One is not less likely to be mistaken in the case of unimportant conduct concerning one's own affairs than in the case of important conduct concerning the affairs of another. In Kroon's case, for instance, the implied assertion in question concerned the state of a third party's crops, and yet it was of considerable importance to the actor. It was highly unlikely, therefore, that the actor in that case would be mistaken about the facts to which his conduct (and non-conduct) pointed.

Hoffmann's suggestions, therefore, are not helpful in providing a rational framework for determining the admissibility of implied assertions: conduct sustaining an inference concerning the affairs of the actor himself may only be considered less susceptible to honest error if that conduct is of importance to the actor. Yet, if the conduct is of importance to him, then he will have a greater motive to misrepresent his state of mind - i e it is more susceptible to dishonest error, or insincerity.

A more scientific criterion for admissibility could, it is submitted, be laid down along the following lines: Implied assertions, although hearsay, may be received by way of an

exception to the rule, provided there are sufficient indications of their reliability. These indications must provide sufficient guarantees against the possibility of both honest and dishonest error on the part of the actor, and, without attempting to lay down a closed list of factors, may include the following: [77]

A Factors rebutting honest error: The importance of the conduct, whether it concerned the actor's own affairs, whether the facts were within the actor's own personal knowledge and experience, whether he had a proper opportunity to perceive the fact to which his conduct points, whether he was properly qualified to evaluate that event, and the length of time between that event and the conduct in question.

B Factors rebutting dishonest error: The non-assertiveness of the conduct, whether it was against the actor's own interests, and whether there is any special motive to misrepresent.

A proper assessment of these factors must await later consideration, but the important point to be made at this stage is that it is dangerous and misleading to attempt to distinguish between classes of implied assertions on the basis of one or two arbitrary factors. The nature of the problem is such that it demands investigation on the basis of a broad perspective, taking into account all the factors and values that lie at the core of hearsay theory.

It is necessary next to consider a group of cases where our courts have admitted evidence of implied assertions - a

group of cases[78] described as reflecting "specially recognised exceptions of long standing". These cases, some of which have been encountered already, concern statements or conduct which carry an implied assertion that the declarant or actor had contracted a marriage (Dysart Peerage Case[79]), fathered a child (Aylesford Peerage Case[80]), Lloyd v Powell Duffryn Steam Co Ltd[81]), or made a will. As the first two categories have already been discussed, attention will now be focussed on the third group concerning the making of a will.

In Kuntz v Swart,[82] the issue was whether a will had been forged, and evidence was admitted of statements made by the testator both before and after the date of the alleged will in order to show that he had not made the will in question. No objection was raised to the reception of this evidence, which circumstantially tended to show that the testator had not executed the will, and the hearsay problem was not canvassed. A similar case is that of De Lange v Rudman.[83] In R v Foreman (1),[84] however, the court considered the matter in greater depth: Beadle J reviewed the authorities on this topic and concluded that in deciding whether a will was a forgery, evidence of statements made by the testator, which tended to show that his state of mind was such as to indicate that another and different will was in fact his valid will at the time of his death, was admissible. As regards the basis for admissibility, the learned judge seemed to rely on the view of Scoble[85] that this constituted an exception to the rule against hearsay.

The decision in Foreman's case was approved and applied in R v Basson,[86] where Ogilvie Thompson J was asked to give a ruling on the admissibility of two classes of statements. The accused were charged with forging a will dated 3 June 1952, the testatrix having executed a valid will on 12 August 1950, and the prosecution tendered evidence of statements (a) made by the testatrix before 3 June 1952 to the effect that she had declined to make a joint will with her husband (who was one of the accused), and (b) statements by her after 3 June 1952 to the effect that she wished action to be taken in terms of the will of 12 August 1950. As regards the first category, the learned judge held that the evidence should be received as establishing the state of mind of the testatrix. Reliance was placed on the views of Wigmore,[87] who considered such evidence admissible by way of exception to the hearsay rule. The second category was also held admissible, "as being indicative of the state of mind of the testatrix in relation to the question of whether the second will had been made, thereby revoking the earlier will."[88]

CONCLUSION ON THE TREATMENT OF IMPLIED ASSERTIONS IN SOUTH AFRICA

The state of the law on this topic in South Africa is well described by Lansdown and Campbell:

> "As the authorities now stand, ... it cannot be stated with any confidence whether the rule against hearsay does not apply to conduct not intended to be assertive, or whether it does apply and is received in certain cases, such as to show relationship, under an exception to the rule."[89]

Nevertheless, it is submitted that the following comments may be made in this regard:

(I) Whatever the position is regarding conduct and oral statements, the position is clear in respect of written statements contained in a document. Sec 34(1) of the Civil Proceedings Evidence Act 25 of 1965 and s 222 of the Criminal Procedure Act 51 of 1977, which are derived from the English Evidence Act 1938, provide that subject to certain conditions,

> "where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible evidence of that fact ..." [90]

A "statement" is defined to mean any representation of fact, whether made in words or otherwise,[91] and thus would include representations made by way of either express or implied assertions.[92] The letters which were excluded in Wright's case would now be rendered admissible as representations made by the writer concerning the fact of the testator's sanity (provided of course such opinion were sufficiently relevant).

(II) As regards other implied assertions, which are not rendered admissible by these statutory provisions, the least that can be said is that there exists a special category of cases which reflect exceptions of long standing and which allow evidence of implied assertions of paternity, marriage and certain testamentary declarations to be received by way of exception to the hearsay rule.

(III) This leaves a large residual class of implied asser-

tions whose status is shrouded in uncertainty. The case law is not conclusive. Certainly there is no case which states specifically that implied assertions are non-hearsay. On the other hand, the cases which hold the contrary are not totally convincing either: Wright v Doe d Tatham[93] and Teper v R[94] do not seem to have been applied with any measure of tenacity in subsequent English decisions, while S v Van Niekerk[95] and Kroon v J L Clark Cotton Co (Pty) Ltd[96] are the only South African cases to have held that implied assertions do fall within the scope of the hearsay rule. Such assertions, have, furthermore, on several occasions been received (most notably in S v Qolo), although the point was not specifically raised and analysed in any of these decisions. Strictly speaking, therefore, our courts are bound by the decisions in Wright and Teper, and unless these decisions are expressly overruled by the Appellate Division, they must be regarded as reflecting the applicable law.

(IV) The safest view to adopt in the light of the above, is that the matter awaits either clarification by the Appellate Division or reform at the hands of the Legislature. In the light of the uncertainty this topic has elicited in the courts, it would seem that the latter alternative is more probable. What follows in the next chapter is a brief review of the leading academic commentary on the question, with a view to shaping the most suitable and satisfactory reform of this vexing issue.

NOTES TO CHAPTER VII

1 1964 (1) SA 729 (C).

2 At 730.

3 At 731.

4 Phipson on Evidence 9ed (1959) at 221; see, however, the definition employed in the most recent edition, Phipson on Evidence 13ed (1982) at 329, which is set out above at p 93.

5 1939 AD 106 at 119.

6 Supra note 1 at 732-3.

7 L H Hoffmann South African Law of Evidence 1ed (1963).

8 1964 (1) SA 729 (C) at 733; the extract is from Hoffmann, op cit note 7, at 281.

9 Wigmore Evidence II 3ed (1940) paras 267-272.

10 Supra note 1 at 734.

11 Id at 733-4.

12 C W H Schmidt Bewysreg 2ed (1982) 453-5.

13 Sir Rupert Cross Evidence 5ed (1979) 470.

14 In the first edition of Die Bewysreg (1972), it was submitted, at 341 note 13, that the exclusion of the evidence in Wright's case could be explained on the basis of the opinion rule. This submission does not appear in the second edition. It is submitted that while the decision may be justified on this ground, it may not be explained solely on the basis of the opinion rule. The tenor of the judgments, particularly that of Baron Parke, is such as to make it clear that the hearsay rule, and not the opinion rule, was considered to be the major impediment to admissibility.

15 1965 (1) SA 174 (A).

16 Schmidt, op cit note 12, at 442.

17 1913 TPD 561.

18 1906 T.S. 154.

19 1927 SWA 80.

20 1959 (4) SA 457 (T).

21 1977 (1) SA 795 (C).

22 Wigmore Evidence VII 3ed (1940) paras 1917-1921.

23 1957 (3) SA 223 (A). See further, for a full discussion, L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) 75-80 and D T Zeffertt "Opinion Evidence" (1976) 93 SALJ 274.

24 Hoffmann and Zeffertt, op cit note 23, at 18.

25 See p 288 post.

26 1983 (2) SA 197 (E).

27 At 206 E-F.

28 At 206 G-H.

29 See pp 253 to 267 ante.

30 Supra, note 26, at 207F.

31 1965(1) SA 174 (A).

32 Schmidt, op cit note 12, at 455.

33 At 184.

34 Schmidt, op cit note 12, at 455 note 11.

35 See The Law of South Africa IX (1979) par 440; Hoffmann and Zeffertt, op cit note 23, at 105-6 esp note 17.

36 (1973) 90 SALJ 185.

37 1968 (2) SA 45 (A).

38 1967 Annual Survey of South African Law 399-401.

39 Id at 400.

40 Ibid.

41 Wigmore Evidence II 3ed (1940) paras 267-272.

42 1964 (1) SA 729 (C) at 733.

43 See R H Christie The Law of Contract in South Africa (1981) 13-15.

44 Per Wessels JA (with whose judgment the other members of the court concurred) in SAR & H v National Bank of SA Ltd 1924 AD 704 at 715.

45 Schmidt, op cit note 12, at 454 note 7.

46 1913 TPD 561.

47 At 566.

48 Alfred V Lansdown and Jean Campbell South African Criminal Law and Procedure V (1982) 815.

49 Supra note 46 at 567.

50 Supra note 46, at 567; see Lansdown and Campbell, op cit note 48, at 815 note 50.

51 1906 T.S. 154.

52 Wigmore Evidence VI 3ed (1940) para 1767.

53 See Hoffmann and Zeffertt, op cit note 23, at 115-8.

54 1927 SWA 80.

55 At 82.

56 1959 (4) SA 457 (T).

57 The court relied on Phipson on Evidence 9ed (1952) 221; these views have been substantially modified in the more recent editions - see 13ed (1982) 329.

58 See Hoffmann and Zeffertt, op cit note 23, at 100-1, S v Forbes 1962 (3) SA 964 (C) and Albrecht v Newberry 1974 (4) SA 314 (E) for the view that such evidence is hearsay. But see Schmidt, op cit note 12, at 455-6, Vengtas v Nydoo (3) 1963 (3) SA 964 (C) and R v Manyana 1931 AD 386 at 389 for the contrary view.

59 Supra note 56 at 460.

60 1977 (1) SA 795 (C).

61 At 797.

62 See p 279 ante.

63 For a full discussion see pp 310 to 312 post.

64 Schmidt, op cit note 12, at 460.

65 1924 CPD 341 at 342.

66 A J van Wyk "Die Hoorsêreël in Perspektief" (1979) THRHR 202.

67 J C Ferreira Strafproses in die Laer Howe 2ed (1979) 452-5. It is of interest that Ferreira was assisted by Van Wyk in writing this section.

68 1977 (3) SA 618 (T) at 622.

69 Ibid.

70 Wigmore Evidence II 3ed (1940) paras 267-272.

71 G L Peiris "The rule against hearsay and the doctrine of res gestae; a comparative analysis of South African, English and Sri Lankan Law" (1981) 14 CILSA 1.

72 Id at 2.

73 L H Hoffmann "Implied Assertions as Hearsay" (1964) 81 SALJ 151; see also Hoffmann and Zeffertt, op cit note 23, at 104.

74 Id at 151.

75 Id at 152.

76 Id at 153.

77 But see Chapter X, post, for a fuller account of such factors at pp 479-481.

78 1964 (1) SA 729 (C) at 734.

79 (1881) 6 App Cas 489

80 (1885) 11 App Cas 1; see also S v Gin 1967 (1) PH H 135 (A).

81 [1914] AC 733.

82 1924 AD 618.

83 1928 EDL 439.

84 1952 (1) SA 423 (SR).

85 C Norman Scoble The Law of Evidence in South Africa 2ed (1945) 249.

86 1965 (1) SA 697 (C).

87 Wigmore Evidence VI 3ed (1940) paras 1734-5.

88 At 701.

89 Lansdown and Campbell, op cit note 48, at 817.

90 Section 34(1) of Act 25 of 1965.
For a full discussion of the provisions of these sections, see Hoffmann and Zeffertt, op cit note 23, at 137-145.

91 Section 33 of Act 25 of 1965.

92 See Hoffmann and Zeffertt, op cit note 23, at 139; see also Saunders v Saunders [1965] P. 499, [1965] 1 All ER 838.

93 (1837) 7 Ad & El 313, 112 ER 488.

94 [1952] AC 480, [1952] 2 All ER 447.

95 1964 (1) SA 729 (C).

96 1983 (2) SA 197 (E).

Chapter VIII

ACADEMIC COMMENT : A COMPARATIVE ANALYSIS

Weinberg has described academic attempts to solve the problem as "a history of failure",[1] perhaps not a very generous appraisal of some valiant and ingenious proposals put forward by various eminent writers. It is true to say, however, that these views are no less daunting in their variety and irreconcilability than the judicial authority considered above. What follows is a survey of some of the more distinguished contributions, together with a critical evaluation of their respective merits. In the course of this discussion, I shall make use of Weinberg's classification[2], according to which the bulk of academic commentary may conveniently be divided into four categories:

Group I: Those writers who hold the view that all implied assertions, whether they are non-assertive statements or non-assertive conduct, are hearsay, and ought to be excluded unless they fall within a recognized existing exception to the hearsay rule.

Group II: Those who believe that all implied assertions are hearsay, but who nevertheless argue that this does not necessarily answer the question of whether or not they ought to be admitted in evidence; as existing hearsay exceptions are geared to express assertions, they are not appropriate in dealing with implied assertions, and new 'reliability factors' must be laid down to render certain implied assertions admissible.

Group III: Those writers who advocate that a distinction should be drawn between non-assertive statements, which are hearsay, and non-assertive conduct, which does not fall within the scope of the hearsay rule.

Group IV: Those writers who would confine the hearsay rule to assertive statements and conduct, and who opine that implied assertions are not within the scope of the hearsay rule at all.

Group I: All implied assertions are hearsay and must be excluded unless they fall within a recognized existing exception to the rule:

One of the strongest proponents of this view is Baker, who, in his monograph "The Hearsay Rule" (1950), made the following submissions:[3]

(1) Conduct such as that in Wright v Tatham is "equivalent to a direct and positive statement".[4]

(2) As such, it offends the hearsay rule and must be excluded. Authority for this principle may be found in Wright's case and in the American decision of Thompson v Manhattan Railway [5] (dealt with above under cases of medical treatment).

(3) The result in Wright v Tatham cannot be justified by basing it, as Phipson does, on the opinion rule, because the majority of the judges in the House of Lords "undoubtedly dealt with it as hearsay", and,

in fact, from the comments of Coleridge J and Alderson B, it is even possible that such evidence does not offend the opinion rule.

(4) Therefore, despite the "absence of consideration of the point in other English cases and the difference of opinion amongst text-book writers", when conduct is tendered in evidence to show the actor's belief and hence the truth of that belief, it is hearsay and inadmissible.

Other writers who have subscribed to this view are Chamberlayne,[6] Tregarthen,[7] and Gulson.[8] Gulson distinguished between what he termed 'immediate' and 'transmitted' evidence, the latter being evidence which depends on the veracity or sincerity of another. He classified 'conduct', when offered to found an inference as to the actor's belief and thus to the act believed, as 'transmitted', citing as examples the conduct of the ship's captain discussed previously and the conduct of one who takes flight from a situation as evidence of the fact feared. It is impossible, he concluded, to draw a line between those cases of conduct where the circumstances furnish a reliable guarantee of sincerity, and those cases where they do not. Therefore, he submits, they should be treated alike and excluded unless they fall within the scope of a recognized exception to the hearsay rule.

As Weinberg points out, this view of implied assertions is based on the premise that while the danger of insincerity

may be substantially reduced, (the conduct being non-assertive), the danger of defective memory or perception is not. The perception factor, moreover, is regarded as being more important than the veracity factor in the assessment of the reliability of the evidence, and the utility of the curial devices, such as cross-examination, is considered to be greater in revealing honest errors in perception than intentional misrepresentation of fact. This approach is, however, according to Weinberg, too simplistic. Although it recognizes that implied assertions contain many similar unreliability factors to express assertions, he submits that "too little weight is given to the very real differences between them". [9] The existing exceptions to the hearsay rule, moreover, are designed to admit certain reliable express assertions, but are not designed to deal with implied assertions, which means that many reliable implied assertions would have to be excluded if this view were adopted. Furthermore, he argues, the existing exceptions have justifiably been criticized as being inadequate in that they do not cover all reliable express assertions; why, therefore, should we "extend unsatiafactory criteria even further to attempt to solve a quite different problem?" [10]

With respect, it is submitted that, while there is much merit in the learned author's approach, it is not entirely correct to regard the question of implied assertions as "a quite different problem"; instead it is a different aspect of the same problem, and the challenge facing the courts and the legislature is to devise a comprehensive

solution to the whole hearsay problem, of which implied assertions represent but one complex facet.

Group II: Implied assertions are, analytically speaking, hearsay, but this merely states the problem without solving it; to determine whether they are admissible, the existing exceptions are inappropriate, and new criteria that take into account the aspect of reliability in a more satisfactory manner, must be sought.

This view represents the traditional United States academic approach to the problem,[11] and has many illustrious adherents. As a general observation, most of these writers are in agreement that while implied assertions present many similar unreliability dangers to express assertions, the composite strength of these dangers may differ substantially, thereby warranting different treatment in looking for reliability factors to overcome or, at least, minimize them.

The following represents a cross-section of this school of thought, the popularity of which is borne out by the number of its proponents.

(1) EDMUND MORGAN: One of the most significant contributions to the literature on implied assertions is supplied by Prof. Morgan, who wrote three leading articles on the topic over a period of 13 years. Over those years, a progression and subtle change of approach is discernible,

and it is of considerable interest and value to compare the changing views of the learned author.

(i) 1935 : "Hearsay and Non-Hearsay".[12] In this article, Morgan adopts a "hearsay-danger" analysis to the question of implied assertions, and comes to the inexorable conclusion that there is no logical basis for distinguishing between express and implied assertions as regards the scope of the hearsay rule. Accordingly, he submits[13] that a "comprehensive definition of hearsay" must include:

> "(1) all conduct of a person, verbal or nonverbal, intended by him to operate as an assertion when offered either to prove the truth of the matter asserted or to prove that the asserter believed the matter asserted to be true, and
>
> (2) all conduct of a person, verbal or nonverbal, not intended by him to operate as an assertion, when offered either to prove his state of mind and the external event or condition which caused him to have that state of mind, or to prove that his state of mind was truly reflected by that conduct."

The extremely wide compass of this definition was recognized by Morgan, who argues, nevertheless, that its adoption would not result in increasing "the already too great volume of relevant evidence now within the ban of the exclusionary rules", provided it is intelligently applied. The courts already, he argues, take judicial notice of the reliability of a large category of evidence (such as the reading of a weighing-machine, an almanac, a timepiece etc). This evidence is received despite its hearsay character, and Morgan contends that similar treatment should be afforded to other classes of hearsay in respect of which there exists some satisfactory guarantee of reliability. As he puts it:

> "A frank recognition by the courts that in situations such as these they are dealing fundamentally with hearsay may lead to a more sensible answer to many questions. It will emphasize the truth that an analysis which demonstrates evidence to be hearsay merely states the problem of admissibility but does not solve it." [14]

Implied assertions, therefore, should be admitted, even if they are hearsay, where they are found to be sufficiently reliable. They should only be excluded if "the dangers of deception or error in the proffered evidence which cross-examination would tend to eliminate" are "sufficient to outweigh its probative value". [15] The question is, however, what are the limits of this exception, and what factors should the court look at to assess the reliability of an implied assertion? Morgan submits [16] that the exception should render admissible

> "evidence of nonassertive hearsay conduct of a person when offered to prove immediately his belief in the happening of an event or the existence of a condition and ultimately that the event did happen or the condition did exist, if the trial judge first finds
>
> (1) that the event or condition consisted of the person's <u>own</u> behaviour or condition of which he was <u>then</u> conscious, or
>
> (2) that
>
> (a) the event or condition was within the person's knowledge, and
>
> (b) his conduct offered to evidence the event or condition was a detriment to him, and
>
> (c) it would have been useless for him to undergo that detriment if the event had not happened or the condition had not existed."

In addition to this test, he adds, the courts must also take

cognizance of the fact that many implied assertions relate to the opinion of the absent actor/declarant. In Wright's case, for instance, the implied assertion was to the effect that the writers of the letters were of the opinion that Marsden was sane. This complication adds another danger to the list of recognized testimonial infirmities, viz. the danger that the actor/declarant may not have been sufficiently competent or qualified to draw that inference from the relevant facts. To counter this danger, Morgan adds the following constraint to his proposed 'exception': Evidence of non-assertive hearsay conduct of a person, when offered to prove his opinion or the objective facts from which it was deduced, or both, should be admitted if the trial judge first finds:

> "(1) that such person was an expert both in observing such facts and in drawing accurate deductions therefrom, and
>
> (2) that such person did observe the facts which the evidence is offered to prove, and
>
> (3) that the nonassertive conduct either was a substantial detriment to him which it would have been unreasonable for him to undergo unless it reflected his honest opinion, or would, to his knowledge, have needlessly imposed a substantial detriment upon him unless it reflected his honest opinion." [17]

(ii) 1937 : The Hearsay Rule". [18] In this article, Morgan re-states his definition of hearsay but now suggests an alternative approach as regards the reception of implied assertions which fall within its scope. The court, he submits, should first examine all the recognized exceptions to the hearsay rule, in order to ascertain whether any is applicable to the evidence in question. If no apt exception exists, the court "ought then to ascertain whether the

dangers of error in perception or memory which might be eliminated by cross-examination are so substantial as to call for its exclusion. If not, the evidence should be received, for by hypothesis neither veracity nor narration is involved." [19]

This represents a far less conservative view than the test laid down previously, and gives the court far greater discretion in evaluating the reliability of the evidence. However, it is submitted, it is difficult to justify the exclusion from consideration of the dangers of veracity and narration, as both may present very real obstacles to the reception of the evidence. As Morgan himself later conceded, [20] some implied assertions raise the risk of narration - for instance, the cases of the gambling raids, where the police intercept a telephone call of a would-be gambler. It is quite possible, says Morgan, that the speaker was using a code in some secret transaction other than gambling on the races. "The dangers of misinterpretation of this non-narrative language seem", he adds, "frequently not to be perceived." [21] The learned author's own previous omission in this regard would seem to bear out this view.

The same applies to the danger of insincerity, and Morgan was also to recognize a decade later that this risk could certainly not be disregarded merely because the actor/declarant did not possess assertive intent. As Morgan himself pointed out, the declarant's conduct "cannot be evidence of his state of mind unless reliance is placed upon his sincerity." [22] Where, for instance, a woman tells her friends "I am the Pope", and this is tendered as evidence of

an insane delusion that she believed herself to be the Pope, Morgan argues as follows:

> "[I]t will be totally without probative value unless she believed her declaration to be true. If she knew it was false, she might have been abnormal or she might have been trying to create a community opinion that she was abnormal, but she would not have been laboring under the delusion that she was the Pope. If she was sincere, she was trying to convey the idea that she was the Pope - not the idea that she believed herself to be so." [23]

However, the learned author concludes, "even in cases where the relevance of the Declarant's conduct turns on his sincerity, few, if any, judicial discussions pay serious attention to this aspect of the evidence. In most of them it is not even noticed", [24] (again a rather ironical observation in the light of Morgan's own views expressed a decade before). This omission, he continues, is

> "somewhat remarkable in view of the emphasis on sincerity which is found in decision after decision when evidence is of conduct assertive of a proposition to be proved, and also in view of the orthodox justification for the recognized exceptions to the hearsay rule, namely, the existence of a guaranty of sincerity in the circumstances of the utterance." [25]

In conclusion then, it would seem, by the author's own confession, that the views expressed in 1937 constituted too radical a relaxation of the hearsay shackles.

(iii) 1948 : "Hearsay Dangers and the Application of the Hearsay Concept". [26] In one of the most scientific and searching analyses of the nature of the hearsay concept yet attempted, Morgan considers the traditional hearsay dangers raised by implied assertions, and concludes by setting out

a two-tier programme for the reform of hearsay theory. The first proposal assumes that one could start anew and reformulate the law, while the second "more realistic" proposal takes account of the practices which have become too established to dislodge, attempting nevertheless to salvage some semblance of logic and consistency.

PLAN I:

1. Within the category of hearsay must be included "all evidence which requires the trier to rely upon the use of language or the sincerity or the memory or the observation of a person not present and not subject to all the conditions imposed upon a witness." [27]

2. But this does not mean that all hearsay must necessarily be excluded, for Morgan foresees "as the basis of the system the principle that all relevant evidence is admissible", [28] with the hearsay rule only operating to exclude evidence (which does not fall within one of the existing exceptions) if the declarant is available but not present for cross-examination.

3. The trial judge should, however, have an "almost unlimited discretion to reject relevant evidence of such slight probative value as to be outweighed by the risk that the admission would require undue consumption of time or substantial danger of confusing or misleading the trier or of unfairly surprising the adversary." [29]

PLAN II:

1. So long as 'hearsay' is a prima facie bar to admissi-

bility, we should "recognize that it would be foolish to include in hearsay all evidence that raises any one of the hearsay risks".[30] But, on the other hand, we should recognize that "the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted', but rather the presence of substantial risks of insincerity and faulty narration, memory and perception."[31]

2. We should therefore exclude from the hearsay rule the prior statements of a witness subject to oath and cross-examination, as in fact these assertions do not involve the traditional hearsay dangers.

3. The classification of evidence as hearsay should not result in its automatic exclusion. Much of the evidence which the courts already admit falls analytically within the hearsay concept, and some of the evidence which is customarily labelled hearsay in fact raises the hearsay dangers to no greater extent than evidence now admitted under the hearsay exceptions.

Both proposals, then, advocate a judicial discretion to exclude hearsay in certain instances and reject the present automatic exclusion of hearsay merely because it carries that label. The difference between the two proposals lies in the definition of the hearsay concept and the nature of the discretion. The first proposal defines hearsay as evidence presenting any ONE of the traditional hearsay risks,

and advocates a general rule of admissibility subject to the normal test for legal relevance; the second proposal sees hearsay as evidence in which the traditional dangers are substantially present, and allows a trier a general discretion to admit such evidence despite its hearsay label if the facts of the case provide sufficient guarantee of its reliability. It is submitted that the second theory, being more in line with traditional thought, is a more satisfactory model for law reform, although it also has its faults: no criteria are put forward to guide the court in the exercise of its discretion, and no factors are mentioned which may be looked at to measure and minimize the hearsay dangers contained in any individual item of evidence.

The writing of Prof. Morgan has thus provided an invaluable and ingenious source of original thought, and his views have provided both inspiration and ammunition for many of the authors who followed him. Much of what follows is thus inevitably foreshadowed by the views of the learned author, whose succinct, scientific and elegant writing has richly embellished the Law of Evidence in general, and hearsay theory in particular.

(2) CHARLES T McCORMICK: Another writer to identify the problem of implied assertions at an early stage was McCormick. As early as 1930, he wrote an article entitled "The Borderland of Hearsay",[32] in which he expressed the view that implied assertions are as much hearsay as express assertions to the same effect. The result, he adds, is that "evidence which has the strongest circumstantial guarantees of relia-

bility may be banned. Evidence that a doctor, since deceased, has operated upon a man for appendicitis, would be inadmissible as evidence that the patient actually had that disease." [33] The fault, he said, lies in the formulation of the hearsay rule, adding: "Would it not have been wiser to set up the hearsay rule in (the following) form: 'Hearsay is inadmissible except where the judge in his discretion finds it needed and trustworthy'". [34]

McCormick added, however, that on the other hand "much of such conduct-evidence if admitted would be of trivial value and probably a general inclusionary rule ... would be only one degree better than wholesale exclusion", and therefore that non-assertive conduct should only be admitted in evidence when "the trial judge in his discretion finds that the action so vouched the belief as to give reasonable assurance of trustworthiness." [35] He did not elaborate on this conclusion, nor did he explain what kind of "action" would "give reasonable assurance of trustworthiness", but Falknor, writing in 1940, [36] submits that the tenor of McCormick's argument seems to justify the following interpretation: To give an assurance of trustworthiness, the action necessarily "must be of significance to the actor". Therefore, "if the actor was sufficiently satisfied with his observation and recollection of the relevant event or condition to predicate action important to himself upon his belief in that event or condition, there is enough to be said for the trustworthiness of his belief, though uncross-examined, to permit it to be presented to the tribunal as a basis of a possible inference to the event or condition." [37]

Furthermore, Falknor submits, "McCormick undoubtedly assumed that, before evidence of any instance of conduct would be admitted, it must appear that the actor either observed or had the opportunity to observe the relevant event or condition, and further, that nothing affirmatively appears casting substantial doubt upon the quality of his recollection." [38]

It is interesting to note that the authors of the most recent edition of McCormick's Handbook of the Law of Evidence [39] reject this notion out of hand in the following manner:

> "While the suggestion has been advanced that conduct evidence ought to be admitted only when the actor's behaviour has an element of significant reliance as an assurance of trustworthiness, a sufficient response ... is that the factor is one of evaluation, not a ground for exclusion. Undue complication ought to be avoided in the interest of ease of application." [40]

The learned authors express the view that the risks of narration and sincerity are substantially reduced in the case of implied assertions, while the risks of memory and perception, arising from the chance of honest mistake, "seem to be factors useful in evaluating weight and credibility rather than grounds for exclusion." [41]

(3) JUDSON F FALKNOR: Falknor is another writer whose views on the topic changed materially over the span of two decades:

(i) 1940 : "Silence as Hearsay". [42] In this article Falknor compares the views of Morgan and McCormick (as set out above), and comes to the following conclusions:

(A) The views expressed by Morgan in 1935 are not entirely satisfactory, as :

1. To admit all implied assertions which relate to the actor's own conduct is to open the gates to a flood of potentially unreliable evidence. The actor, says Morgan, "is not likely to make innocent mistakes in the perception of his own behaviour or in his memory of it";[43] but this, says Falknor, is only true if "the conduct is consequential enough to the actor to reliably evidence his belief".[44]

2. In any event, most non-assertive conduct does not relate to the actor's own behaviour, so we must look to Morgan's alternative ground for receiving implied assertions, viz. if the act/condition was within the person's knowledge, if it was detrimental to the actor and if it would have been useless for him to undergo that detriment if the act had not happened.

3. This requirement, according to Falknor, is (in contrast to the first requirement which is too wide) too restrictive. The requirement relating to detriment, he says, is unnecessarily stringent, and it should suffice that the conduct was of <u>importance</u> to the actor. A detrimental quality would, he adds, "potently negative untrustworthiness due to untruthfulness",[45] but this is not necessary in his view, as the evidence, being non-assertive, will not founder on the danger of insincerity.

(B) The solution proposed by McCormick (and as exterpolated

by Falknor himself) provides a middle path between these two parameters, and "represents the most desirable solution".[46] While non-assertive conduct must be classified as hearsay (as it presents some of the dangers traditionally associated with hearsay), they should be admitted by way of an exception, but only if the trial judge first finds that

> "(a) the actor had personal knowledge of the fact ... to the proof of which the evidence is offered; more precisely that it fairly appears that the actor observed or had the opportunity to observe such event or condition and that nothing appears to cast substantial doubt upon the quality of his recollection at the time of the conduct; and
>
> (b) that the conduct was important or significant to the actor in his affairs and so vouched his belief 'as to give reasonable assurance of trustworthiness'." [47]

As regards silence, or non-assertive non-conduct, because of the greater danger of insincerity inherent in such evidence (see Silence Cases above), a third requirement is proposed:

> "(c) in the case of negative conduct (i e inaction) or silence, that such negative conduct or silence was a detriment to the actor." [48]

(C) The views expressed by Morgan in 1937 are also not entirely satisfactory, as they constitute too broad a ground for admissibility. Taking Morgan's "1937 views" at their face value, he argues, a trial judge may well feel justified, on an issue involving the mental competency of a testatrix, in admitting evidence that certain boys in the neighbourhood used to make fun of her,[49] if it appeared that the boys had personal knowledge of her behaviour. However, he argues,

> "it seems clear that there is just as much danger of deficiency in observation and recollection in the use of trivial conduct of this character as in the case of a hearsay assertion. The belief of the actor lacks that strong avouchment which, for example, is so apparent in the

> conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family'." [50]

This criticism is difficult to comprehend; if in fact the evidence of the boys' "making fun" of the testatrix raised any substantial risk of defective memory or perception, then the evidence would be inadmissible in terms of Morgan's 1937 formulation. As already stated, the 1937 formulation is incomplete in that it takes no account of errors in narration or insincerity, but that is an entirely different issue.

(ii) 1954 : "The Hearsay Rule and its Exceptions". [51] In a substantial departure from his previous views, Falknor welcomes as a "commonsensible advance" the proposed provision in the Uniform Rules of Evidence which would "settle this troublesome matter by removing the hearsay stigma from all evidence of non-assertive conduct". [52] He did not elaborate on this remark, but this statement formed the nucleus of his views expressed seven years later.

(iii) 1961 : "The 'Hear-Say' Rule as a 'See-Do' Rule : Evidence of Conduct". [53] Here Falknor recanted entirely his previous views, saying:

> "it has sometimes been suggested that the admissibility of non-assertive conduct should depend on a preliminary finding by the judge that the conduct was of a sort 'as to give reasonable assurance of trustworthiness', that is to say, that it was of substantial importance to the actor in his own affairs. But for application in the 'heat and hurry' of the trial, such a solution leaves a good deal to be desired. As Thayer [54] observed, 'we should have a system of evidence, simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied'." [55]

Accordingly, he put forward the following suggestions:

a. The hearsay stigma should be eliminated completely from evidence of non-assertive conduct. The basis for this proposition is that such conduct is "evidently more dependable than an assertion"[56] because of the absence of the danger of intentional misrepresentation. (He does concede, however, that this does not mean that implied assertions are completely free of hearsay infirmities, or that cross-examination of the actor would not be helpful.) Another "cogent practical argument"[57] for such a rule, he argues, is that "experience has shown that very often, probably more often than not, and understandably the hearsay objection is overlooked in practice with the result that the present doctrine operates very unevenly".

b. He therefore welcomes the provisions of Rule 62 of the Uniform Rules of Evidence, which, for the purposes of the hearsay rule defines a "statement" as including only "non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated".

c. This does not, however, mean that <u>all</u> non-assertive conduct would be received, as there remains still the question of <u>relevance</u>. In terms of Rule 45, such evidence would be excluded if the judge were of the opinion that its probative value was "substantially outweighed" by certain listed "counter-

factors": that reception of the evidence would take more time than it was worth, that it would confuse the issues, mislead the jury, create undue prejudice or unfairly surprise the opponent.

It is interesting to note that these factors, which are taken into account by our common law in determining whether any item of evidence is "legally relevant", overlap substantially with the traditional hearsay dangers. Is it too fanciful to suggest that perhaps the Uniform Rules in effect, if not in form, place upon the trier the same obligations as does the test put forward by Morgan in 1948? If, therefore, implied assertions are "legislated out" of the scope of the hearsay rule, would this not be a mere re-phrasing of the same basic question of admissibility under a separate category? Would not the court, in determining the legal relevance of the evidence, be compelled to take into account the same criteria that Morgan has advocated in his proposals to reform the hearsay rule? At least one writer who has expressed this belief is Ted Finman.

(4) TED FINMAN: In an article published in 1962 entitled "Implied Assertions as Hearsay : Some Criticisms of the Uniform Rules of Evidence",[58] Finman criticizes the traditional argument put forward to justify excluding implied assertions from the scope of the hearsay ban. This argument runs along the following lines: With express assertions, we have four hearsay dangers, whereas with implied assertions we only have two, as the dangers of ambiguity and

insincerity are eliminated; thus implied assertions are not within the sphere of the exclusionary rule. This argument, he argues, is based, however, on two "questionable assumptions":[59]

(i) That the four traditional hearsay dangers are the only ones that need be considered in assessing the need for cross-examination. In fact, Finman points out, reliance on implied assertions involves two additional dangers:

(a) The danger of wrongly classifying the actor's conduct as either assertive or non-assertive. As this "assertive intent" can only be inferred from the actor's conduct or words, the admissibility of which is in question, the need for cross-examination in this regard is at least as great as in the case of the traditional hearsay dangers.

(b) The danger of drawing a correct inference as to the actor's belief from his conduct. In the case of express assertions, the declarant's belief is expressly stated; in the case of implied assertions, however, the trier is required to infer this belief from a set of possible beliefs, normally resorting to that belief which would be shared by a reasonable man in the position of the actor. This in turn presents further dangers: What if there are several possible beliefs, each equally reasonable or plausible? What if the actor's actual belief does not coincide with that of the reasonable man - for instance, if he entertains an illogical belief, or is

motivated by abnormal impulses? In such cases, clearly the danger of wrongly inferring a belief would be considerable.

(ii) That the utility of cross-examination is the same in respect of each of the four hearsay dangers. This, again, is highly questionable. As Morgan[60] attests, the most important service of cross-examination is in exposing faults in perception and memory, its utility being considerably less in revealing defects in sincerity and use of language. The fact that these latter dangers are substantially reduced in the case of implied assertions would therefore seem to be no justification for classifying them as non-hearsay.

The next question, says Finman, is whether there is anything in the nature of implied assertions which would provide protection against the risks of receiving them, and thus serve as a substitute for cross-examination. In this enquiry, he considers particularly the approach of writers such as McCormick who suggested that the importance of the conduct to the actor would constitute adequate protection. The weakness of this approach, he argues, is that a number of factors can affect the reliability of an implied assertion, and the importance of the act by itself is no rational basis for a comprehensive and satisfactory classification.

Finman then considers the approach adopted in the Uniform Rules of Evidence (set out above), and comes to the conclusion that to define the hearsay rule as applying only to assertive statements and conduct is an unsatisfactory way of

resolving the problem. A court would still have to decide whether the conduct in question was intended to be assertive (and thus hearsay) or non-assertive (and thus non-hearsay), an enquiry which would necessitate examining all the usual hearsay dangers in drawing an inference as to assertive intent, which dangers could have been materially reduced with the aid of cross-examination. And further, even if the court were to conclude that the conduct was non-assertive, and thus fell outside the scope of the hearsay rule, the court would still have to decide whether it was legally relevant, using the guidelines set out in Rule 45. This would entail balancing the probative value of the evidence against the risks of receiving it, which would involve once more a consideration of the hearsay dangers. Thus, whether the trier considers these risks in terms of the hearsay rule or in terms of relevance, the fact remains that the enquiry is the same, and instead of ignoring the problem by defining hearsay to exclude implied assertions, there is a need for a system which (a) helps the court to identify the problem and (b) indicates factors which may guide a court in assessing the dangers and evaluating their effect.

The solution which Finman proposes,[61] then, is as follows:

1. To promote clear perception of the problem, implied assertions should be classified as hearsay.

2. This would not end the matter, however, as they would nevertheless be admissible either i. if they fell within any presently existing exception to the hearsay rule or ii. if they fell within the ambit of a newly-created

exception, specifically designed to meet the problem.

3. The formulation of this new exception could be approached in one of two ways:

   i. One could provide that an implied assertion is admissible ONLY under certain specified conditions, e g "if the actor, by the conduct constituting the assertion, has relied to his detriment on the fact that the assertion is offered to prove", or

   ii. one could point out certain factors which could guide the court in the exercise of a general discretion to admit such evidence, provided

      a. the declarant is unavailable as a witness and

      b. the court finds that he had an opportunity to perceive the matter the evidence is offered to prove. Furthermore, the court should satisfy itself that cross-examination of the declarant would be of no substantial value in revealing errors or defects in:

         (A) sincerity or assertive intent - the court should consider whether the declarant was associated with any of the litigants, and whether the act or statement preceded the controversy between the parties;

         (B) narrative ability - the court should look at whether the conduct might have been motivated by a belief in some other matter;

         (C) memory or perception - the court should

consider whether the conduct was an act of the declarant himself, whether a long time had elapsed between the perception and the act, and whether reliance was placed on his powers of memory and perception; and

(D) forming an opinion based on underlying inferences - the court should keep in mind the fact that it will be impossible to cross-examine the declarant on the data on which these inferences are based.

(5) JACK B WEINSTEIN: An eminent American judge and scholar of evidence law, Judge Weinstein is another leading writer to suggest that the approach taken in formulating the Uniform Rules is not entirely satisfactory in this regard. As the learned author submits,

> "No judge or lawyer should be misled by the Uniform Rules' narrow definition of hearsay; the argument of hearsay danger should be made to the trier in helping him evaluate evidence which requires reliance on the credibility of an extra-judicial declarant." [62]

Furthermore, he adds, "[t]here is considerable danger ... that the indirect technique of weakening the hearsay rule by narrowing its definition and expanding exceptions will prevent development of advance warning techniques",[63] thereby reducing the control of the court over hearsay of limited value. Another fault of the Uniform Rules' approach, is that they "fail to provide any growth principle for the admission of hearsay which is needed and has a high probative force but which does not come within one of

the exceptions".[64] These considerations prompted the learned writer to advocate "a broad new exception that permits hearsay to come in whenever there is, first, a substantial guarantee of trustworthiness and, second, some good reason why the hearsay declaration cannot be satisfactorily duplicated by present testimony."[65] This would necessitate vesting in the trier a much wider discretion to admit hearsay of high and assessable probative force, taking into account factors such as surprise, possible prejudice through overestimation of force, and the availability of other evidence more easily assessed.

This approach is in use in a number of American federal courts,[66] and is well illustrated by the decision in Dallas County v Commercial Union Assurance Co.[67]. In this case the appropriately-named Wisdom J admitted in evidence an old newspaper account to prove that the courthouse in Selma, Alabama, had been damaged by fire fifty years previously. The basis for allowing the evidence was not because it was "a readily identifiable and happily tagged species of hearsay exception, but because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds".[68]

In a comment on this case, Judge Weinstein states: "Were this general principle adopted explicitly as the main hearsay rule, it would, in effect, make the present twenty or thirty exceptions - depending on how you count them - examples rather than rigid and limiting categories".[69]

Some writers object to a general discretionary rule on the ground that it leads to uncertainty and adds to the already onerous duties of the trial judge. In reply, Weinstein remarks that "[s]ome lawyers prefer a precise bad rule to a discretionary good one".[70] Moreover, to counter the "uncertainty objection", he suggests that notice in advance should be required when hearsay is relied on by a party to litigation. In addition, the discretion to admit hearsay should be exercised in advance of the trial to enable an adversary to "investigate and produce evidence in derogation of particular hearsay".[71]

(6) JOHN M MAGUIRE: In contrast with Judge Weinstein's proposed all-encompassing judicial discretion, Maguire[72] proposes a strict and rigidly-defined formulation of hearsay. While by his own concession his definition is both "overwordy and filthily technical", he believes that "only precise guidance can lead to escape from the present hearsay entanglement".[73] In terms of this definition, Maguire submits that evidence of conduct (defined to include both action and inaction), whether assertive or non-assertive, should fall within the hearsay ban and be excluded (provided no suitable exception exists to rescue it), IF it is so offered as to call for reliance upon untested perception or memory by its maker. Such reliance, he adds, is not called for if the judge finds that the conduct occurred

> "(1) when the person was currently perceiving the matter, or when he had recently perceived the matter and while his recollection of it was clear, or (2) under such circumstances that the person was subject to the sanctions

> of cross-examination with respect to the conduct (behaviour) and the matter. A finding by the judge that the person had adequate opportunity to perceive the matter shall raise a presumption that he did adequately perceive it." [74]

This test is certainly not, as the learned author himself readily concedes, one hundred per cent satisfactory. What if the person who had the opportunity to cross-examine the actor were not the same person as the party against whom the evidence is offered? As Maguire [75] points out, it then "becomes debatable whether he should be subjected to the risk of evidence originally developed against only the other's opposition". Maguire assumes, moreover, that non-assertive conduct "presents no issue of sincerity, only perception or memory or both being at issue", [76] an assumption which, as has been argued above, is highly debatable.

There is, however, an even more serious flaw in this argument, a flaw which is, moreover, common to many of the arguments presented above, most notably those of Finman. Both Finman and Maguire seem to model their arguments around the conventional theory that hearsay is to be excluded on the ground that the actor/declarant was not subject to cross-examination when he acted or spoke, was not under oath, thus rendering his evidence 'untested' and liable to mislead the trier of fact. This "conventional wisdom", however, is challenged by Schiff as being "functionally inadequate" and "far from the whole story". [77]

7. STANLEY SCHIFF: A leading Canadian authority on the law of evidence, Schiff has recently published an

article entitled "Hearsay and the Hearsay Rule : A Functional View"[78] in which he challenges many traditional and conventional notions surrounding the hearsay rule. The learned author offers two propositions which he describes as seemingly "heretical to many lawyers and would-be law reformers":[79] First that the hearsay rule "makes good sense in its place within that body of legal doctrine governing the working of the adversary trial system", and second that "without benefit of statutory backing, judges should admit any item of hearsay evidence at a trial when the purposes of the hearsay rule within our litigation system would be served no more than barely under the particular circumstances".[80]

(I) To substantiate his first proposition, he examines carefully the demands which the adversary trial system puts on a person who comes to testify at a trial about some particular relevant matter. Such witness is subject to at least eight procedural constraints, all of which were considered in some depth at an earlier stage when the rationale of the hearsay rule was examined.[81] It was mentioned there that, because none of these procedural demands is satisfied in the case of the hearsay declarant, whereas all the requirements have to be satisfied when a witness gives oral, original evidence, Schiff sees the function of the hearsay rule as barring "evidence of words offered to prove the matter they assert when none of the standard demands imposed upon testimonial evidence has been satisfied".[82]

In the light of this perspective of the rationale of the

hearsay rule, he submits that the traditional formulation of its scope is too narrow; an adequate definition should cover both express and implied assertions, which include both non-assertive statements and non-assertive conduct. To illustrate the inaccuracy of the traditional approach, he discusses the case of R v Wysochan [83] (discussed above),[84] where W testified that the deceased had reached out her hand to her husband, after she had been shot, and had hugged him tightly, saying, "I love you, dear." This evidence was admitted by the Court of Appeal for Saskatchewan as tending to prove that the husband had not shot her. However, Schiff submits, the same difficulties are raised here as in the case of an express assertion to the same effect, viz. that "the wife was not subject to any of the witness conditions at any time before or while she acted in the way described and, were the evidence admitted, the opponent and the trier of fact would suffer exactly the same disadvantages." [85]

Therefore, the learned author adds, in the light of the abovementioned reasons for the hearsay rule, all those decisions which take the view that implied assertions fall outside the hearsay ban (such as Lloyd v Powell Duffryn Steam Coal Co [86] and Ratten v The Queen [87] and Wysochan's case itself) must be considered incorrect and counter to the correct view expressed in Wright v Tatham. This misconception of the hearsay concept, Schiff continues, has also been adopted by the Law Reform Commission of Canada, as reflected by the definition of hearsay set out in s 27(2) of the (then) proposed Evidence Code.[88] In this section, 'hearsay' is defined to mean "a statement, other than one made by a person

while testifying at a proceeding, that is offered in evidence to prove the truth of the statement", while 'statement' is defined as "an oral or written assertion or non-verbal conduct of a person intended by him as an assertion". This definition excludes implied assertions from the scope of the hearsay rule, and is thus subject to the objections already discussed.

(II) Schiff then proceeds to consider his second proposition, viz. that the courts, even without the benefit of statutory backing, should admit hearsay evidence, in the form of both express and implied assertions, when the purposes of the rule in the adversary trial system would not be substantially served in the circumstances of the particular case. If a declarant is available to give oral evidence, he argues, then there is no good reason for waiving the standard procedural demands. But where he is unavailable, through no fault of the proponent, then the judge should allow the evidence "if the introduction would not at that time at that trial substantially harm any of the interests our system's demands upon witnesses protect".[89]

This approach, he suggests, is not quite as heretical in Canada as it would at first seem. In the case of Ares v Venner,[90] for instance, the Supreme Court of Canada threw aside the shackles of Myers v DPP[91] and admitted in evidence certain hospital records even though no existing exception could be invoked to allow their reception. The court unanimously adopted the minority view expressed in Myers' case, especially the views of Lord Pearce, thus creating an ad hoc

exception to the hearsay rule. In the words of Hall J, in whose judgment the other judges concurred,

> "I am of the opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: 'This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job.'" [92]

Such judicial frankness and boldness is a welcome relief from the over-conservative, tenacious adherence to dogma which has entrenched many debatable premisses so solidly and inflexibly into our hearsay law. Regrettably, it is highly unlikely that the South African Appellate Division will follow suit, particularly in the light of the decision in Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours. [93] In this case the court refused to recognize "the principle of necessity as a basis for relaxing the rule against hearsay beyond the well-established exceptions", [94] indicating the reluctance of our courts to depart from the traditional exceptions to the hearsay rule. [95]

What then of the merits of Schiff's approach? It is respectfully submitted that this approach represents the most scientific and logical solution to the problem that has yet been proffered. Its appeal lies in its rational exploration of the rationale, not only of the hearsay rule, but of the entire accusatorial and adversary procedural models which the rule is designed to serve. It has a flexibility and pristine logic which render it academically sound, while never ignoring the practical and functional features of our trial procedure. The only objection, it is submitted, is

that the model is perhaps incomplete, in that no guidelines are suggested to assist the court in evaluating the prejudice caused to the protected interests, or in identifying any safeguards inherent in the evidence or the circumstances of the case which could serve to mitigate this harm. In this regard, the factors suggested by Finman (supra)[96] could assist the court, but, whereas Finman's comments were confined to the potency of cross-examination, the court would be required to conduct a similar inquiry in respect of any of the procedural demands which, on the facts of the case, require consideration.

Group III: A distinction should be drawn between non-assertive statements, which are hearsay, and non-assertive conduct, which is not:

This "compromise solution", says Weinberg, represents one of the "three distinct views which Professor Cross has propounded in this area".[97] Certainly Cross has changed his mind more than once on this subject, a charge to which the learned author himself pleads guilty, maintaining, however, that he is "unashamed".[98] It is interesting, therefore, to follow chronologically this changing perspective.

(1) 1956 : "The Scope of the Rule Against Hearsay".[99]

In this article, Cross asked whether there is any logical basis for distinguishing between 'apparent belief translated into action' and 'apparent belief translated into words'. He seemed to accept without question that non-assertive statements of the type considered in Teper v R[100] are hearsay and inadmissible, but suggested that conduct should be

divided into two categories:

(i) "Conduct which is relied on as equivalent to an assertion of the actor's perception of or belief in a particular fact",[101] such as the conduct of a doctor who examines an accident victim and places him in a mortuary van, which is relied on as equivalent to an assertion by him that he believes the victim to be dead. Such conduct, Cross said, should be rejected as evidence of the existence of the fact believed, unless it can be admitted by way of exception to the hearsay rule.

(ii) Conduct relied on solely as the "basis of an inference to the actor's contemporaneous state of mind or physical sensation",[102] such as a wife's treatment of her child as illegitimate, relied on to support an inference of her belief in its illegitimacy and thence to the fact of her adultery. Such conduct, he argued, is not within the scope of the hearsay rule; it derives its probative value from the behaviour, not the mere assertion of the person whose mental state or physical sensation is in question, and the evidence is thus 'circumstantial'. It is possible, he conceded, that such an actor "may have been guilty of simulation", but contended that "this is less common than lying, and more likely to be discerned by the witness who deposes to the conduct."[103]

With respect, I find it difficult to justify this distinc-

tion: if the conduct of the doctor may be regarded as the equivalent of an assertion such as, "I believe the victim to be dead", then surely the conduct of the wife may similarly be regarded as the equivalent of an assertion such as, "I believe my child to be illegitimate". Furthermore, the same untested hearsay dangers are present in both sets of conduct, and the labelling of the second category as 'circumstantial evidence' does nothing to solve the problem.

It is interesting to note, therefore, that at this stage Cross would include within his definition of hearsay all non-assertive statements and certain, although not all, non-assertive conduct.

(2) 1969 : "The Periphery of Hearsay".[104] By now, the learned author had formed a consistent view of the nature of non-assertive conduct. He considered the conduct of the sea captain who embarked on a ship with his family after thoroughly examining it - one of the examples cited by Baron Parke in Wright's case - and concluded as follows:

> "With respect, I doubt the propriety of treating conduct which was not intended to be assertive as something to which the rule against hearsay applies. Admittedly many of the dangers against which the rule provides are present if the evidence of the behaviour of the deceased captain is received. He is not available for cross-examination, he may have been a very incompetent captain, or he may have had reasons for going aboard which were sufficiently pressing to make him take the risk attendant on the defects in the ship which he observed. On the other hand, one can say that the fact that deeds generally speak louder than words is sufficient justification for treating that which was not intended by the agent to be assertive as falling outside the ban on hearsay. To my mind, however,

> there is a far more cogent reason for adopting this course; if such conduct is to be treated as hearsay whenever it is proved as equivalent to an assertion by someone other than the witness who is testifying there will be no end to the situations to which the hearsay rule will apply." [105]

By 1975, Cross was even more adamant about drawing this distinction between non-assertive statements and conduct, saying that it "has <u>even</u> been suggested that the rule against hearsay applies to conduct which was not intended to be assertive if reliance is placed on the conduct as an implied assertion". [106] He rejects this seemingly preposterous suggestion - despite the fact that he himself was one of its proponents 19 years before - on the ground that "[i]f the rule were to be held to extend to assertions implied from conduct not intended to be assertive, as distinct from verbal utterances not intended to be assertive, its scope would be unduly wide." [107]

Weinberg, correctly, it is submitted, rejects this distinction as being unjustifiable. [108] It is based, he says, on the assumption that once a piece of evidence has been labelled hearsay, it should summarily be rejected. We should not distort the scope of the hearsay rule merely because the labelling of non-assertive conduct as hearsay would force us to create more exceptions to the exclusionary rule, and, he submits, if we had "recognized all along that implied assertions logically must be classified as hearsay, it is probable that the current unsatisfactory rigid hearsay rule with its inflexible exceptions would never have emerged in its present form, and we would not now be faced with the urgent need to modify it." [109]

Moreover, it is submitted, it is difficult to understand why deeds should "speak louder than words". Implicit in the nature of both non-assertive statements and conduct is the fact that the declarant/actor did not intend to communicate his belief. The danger of insincerity is thus materially reduced. What other dangers, however, can be said to be reduced by the fact that a person unintentionally conveys his belief by way of conduct instead of words? I submit none. Admittedly it is less likely that a person would stage a charade to misrepresent his belief by conduct than by words, but this relates only to the danger of assertive intent, which must be eliminated before the evidence may be labelled "non-assertive". Once it is so labelled, all the other dangers remain intact. The distinction advanced by Cross is, therefore, it is respectfully submitted, of no assistance.

(3) 1979 : Cross on Evidence (5th ed).[110] In his last pronouncement of the law on this topic, the learned author was somewhat more ambivalent in his treatment of implied assertions, stating that "on the present state of the authorities more than one view can justifiably be taken on the question".[111] He concluded, however, with the following "highly tentative" submissions:[112]

(i) The hearsay rule only applies to statements intended by their makers to be assertive.

(ii) Statements of the form "Hello X", however, in the context of one person greeting another, must be considered as being assertive, expressing not

merely greeting but also recognition. They must therefore be considered hearsay if tendered as evidence of the presence of X at the place in question, in accordance with the decision in Teper v R.[113]

(iii) On the other hand, verbal and non-verbal conduct not intended to be assertive falls outside the ban of the hearsay rule even when the conduct is only relevant because it points to the fact that the actor entertains a particular belief (e g the ship's captain example discussed above).

It is respectfully submitted that these statements are confusing and contradictory. If "Hello X" is to be regarded as assertive of the fact of X's presence, then there is no logical reason for withholding the same status from all non-assertive statements or verbal conduct. This conclusion, of course, conflicts with submission (iii). Then, if non-assertive statements are considered to be hearsay, in line with what was said above, there is no logical basis for treating non-assertive conduct any differently.

Cross's last submissions on this question would therefore seem to be a final, valiant but unsuccessful attempt to strike a balance between the authority of cases such as Wright and Teper on the one hand, and the accepted limitations and inflexibility of the exclusionary rule on the other.

Group IV: Implied assertions, whether non-assertive statements or non-assertive conduct, are not within the scope of the hearsay rule at all.

(1) WIGMORE: Few discussions of evidentiary topics are complete without a consideration of the views of Wigmore. On the question of implied assertions, however, the learned author, somewhat uncharacteristically, does not seem to adopt a clear stance. In fact, two directly conflicting views are to be found in different passages of his Treatise:[114]

(i) Para 459: The learned author asks us to consider the case of an observer who looks out of the window of a comfortable home and sees that the persons on the highway are shuddering and turning up their collars. From this, he argues, the natural inference is that it is extremely cold outside. If this evidence is tendered to establish the latter inference, he asks, is this an infringement of the hearsay rule? The answer, he says, is no, for the following reason:

> "The Hearsay rule excludes extra-judicial assertions only, i e deliberate utterances in terms affirming a fact; and, although in effect an inference from conduct may be the same in result as an inference from assertion, nevertheless the two are distinct. Nor does the policy or spirit of the Hearsay rule apply; for that policy is to test the assertions of persons regarded as witnesses, by learning the source of their knowledge and by exposing its elements of weakness and error, if possible; so that where the evidence is not dealing with a person's assertion as de-

> riving force from his personal character, knowledge, or experience, it is not within the scope of the policy of the Hearsay rule." (Italics added).

(ii) Para 267: Wigmore here considers the example of the conduct of parents, who always treated a child as their own, which is offered to establish legitimacy. The belief of the parents, he submits, is "of service only evidentially, i e as forming a second step of inference to some other fact which forms the ultimate object of proof", and concludes that such "double inference" is "practically equivalent to accepting ... the parents' conduct in a purely assertive and testimonial fashion". If such evidence were to be received as circumstantial, he argues, "could not any and every hearsay statement be brought in upon the same plea, by resolving it into a double inference, namely, by translating A's assertion, that he saw M strike N, into an inference from his utterance to his belief and from his belief to the fact asserted?" There is, therefore, he submits, a strong argument "that the pretended double inference of a circumstantial sort is equivalent to giving credit to a testimonial assertion, and involves therefore a danger of evasion of the Hearsay rule".

Imbued with that "instinct of compromise which has affected so many British institutions", the common law, Wigmore submits, conceded something to both principles,

viz. the rule against hearsay and the concept of circumstantial evidence. In a few cases, it yielded to the theory of circumstantial evidence (e g the cases concerning marriage, paternity, testamentary belief etc); in others it allowed the implied assertion to be admitted by way of an exception to the hearsay rule; and in all remaining instances, along the lines of the judgment in Wright v Tatham, "it denied the propriety of the circumstantial inference and insisted on the application of the Hearsay rule to conduct which was equivalent to an extra-judicial assertion".[115]

Wigmore's views, it is submitted, reflect well the confused and inconsistent state of the law on this topic, but do little towards clarifying matters or providing a satisfactory framework for reform.

(2) EUSTACE SELIGMAN: In an article entitled "An Exception to the Hearsay Rule",[116] Seligman expressed the view[117] that "only conduct apparently intended to convey thought can come under the ban of the hearsay rule". His reasons for this conclusion were as follows:

> "When there is no intention to communicate to any one there is very much less chance that the act was done in order to deceive, and hence the third and fundamental danger in admitting hearsay does not here exist, or at least not so strongly. Furthermore, as a rule the fact believed in this latter class of cases is a simple one, and hence the first and second dangers [i e inaccurate perception and faulty memory] are decreased."[118]

This argument represents the traditional case for receiving implied assertions as non-hearsay, and rests, as has already been seen, on two misconceptions. First, whereas

the hearsay dangers may sometimes be reduced in any given implied assertion, it is rare that they will all be entirely eliminated. And secondly, in those instances where the dangers are eliminated or considered sufficiently reduced as to guarantee the reliability of the evidence, the position is indistinguishable from that of an express hearsay assertion, the reliability of which is vouchsafed by circumstantial evidence. In the latter instance, a strong case can be put forward for admissibility, but the fact that the evidence relies for its value on the credibility of an absent actor or declarant, and that none of the accepted courtroom devices are available to the adversary of the party tendering the evidence, point strongly to the hearsay-like quality of the evidence. In appropriate cases, it is submitted, such evidence should certainly be admitted. But to deprive it of its hearsay label would be logically untenable and could lead to a disregard of both the dangers inherent in the evidence, and of the safeguards which should be looked at to ensure that such dangers are minimized. This approach, in short, represents a flagrant disregard of the values on which the hearsay rule is based.

(3) PHIPSON: As author of one of the most authoritative English texts on evidence, Phipson is perhaps the most influential opponent to the inclusion of implied assertions within the hearsay label. He submitted that the evidence in Wright's case was excluded not as hearsay but as opinion, and rejected the labelling of such evidence

as hearsay. In any event, he added,

> "the doctrine of Wright v Tatham, on this point, has apparently never been followed, acts of treatment being admitted or excluded on grounds of relevancy only and not of hearsay." [119]

This observation has been criticized by Cross [120] and, significantly, the authors of the most recent edition of Phipson On Evidence. In the 13th edition of that text book, the following passage appears:

> "It is submitted that the better view is to regard the admissibility of certain instances of 'conduct' either as being within the 'res gestae' rule or as particular exceptions to the doctrine in Wright v Tatham. There appears to be no decision of the courts which supports Phipson's rejection of the doctrine." [121]

Although Phipson's views have made a substantial impact on the way in which our courts regard hearsay, it would be anomalous to rely on a view which has been rejected in the latest edition of his book, particularly in the absence of any authority supporting the original contention.

Conclusion

Out of this discordant mass of conflicting views it is, as Weinberg intimates, [122] difficult to find consensus on any particular approach. What does emerge, however, is a general feeling of dissatisfaction about the somewhat random treatment of implied assertions at the hands of the courts. Of the various proposals to remedy this problem, it is submitted that the solution espoused by the modern American writers on this subject is the most scientific. The appeal of this approach lies in the achievement of a

logical, holistic image of the hearsay concept. The inclusion of implied assertions within the hearsay fold is in harmony with the theoretical foundations of the rule discussed in Chapter III. It does, however, necessitate a re-examination of the criteria governing admissibility, as the present structure of exceptions is ill-suited to the peculiar demands of implied assertions, and the exclusion of implied assertions falling outside these exceptions will often deprive the court of probative, valuable evidence. The immediate need, therefore, is for a system of 'reliability factors' to determine the admissibility of implied assertions. However, because of the general dissatisfaction with the law relating to express assertions, it is equally important to extend the enquiry to such assertions and investigate how our hearsay law, as a whole, may be improved. During the course of this chapter, attention was focussed on the views of Prof. Schiff,[123] who advocated predicating the admissibility of hearsay on the fundamental dictates of the adversary trial system. In this approach, it is submitted, lies the key to the problem, and, in the remaining chapters, suggestions will be made as to how this model may be employed as an instrument in reforming South African hearsay law.

NOTES TO CHAPTER VIII

1 Mark Weinberg "Implied Assertions and the Scope of the Hearsay Rule" (1973) 9 Melbourne University LR 268 at 285.

2 Id at 285-292.

3 At 3-6.

4 Id at 6.

5 42 N.Y. Supp. 896.

6 Chamberlayne Evidence (1911) paras 1900, 2706.

7 Tregarthen The Law of Hearsay Evidence (1915) 32.

8 Gulson Philosophy of Proof (1923) paras 193-197, 361-363, 526.

9 Weinberg, op cit note 1, at 286.

10 Ibid.

11 See Weinberg, op cit note 1, at 286-8.

12 (1935) 48 Harvard LR 1138.

13 Id at 1144-5.

14 Id at 1147.

15 Id at 1152.

16 Id at 1159.

17 Id at 1160.

18 (1937) 12 Washington LR 1.

19 Id at 10.

20 In a subsequent article entitled "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harvard LR 177, at 198-202.

21 Id at 198.

22 Id at 202.

23 Id at 203.

24 Ibid.

25 Ibid.

26 Op cit note 20.

27 Id at 218.

28 Ibid.

29 Ibid.

30 Ibid.

31 Ibid.

32 (1930) 39 Yale LJ 489.

33 Id at 504.

34 Ibid.

35 Ibid.

36 Judson F Falknor "Silence as Hearsay" (1940) 89 University of Pennsylvania LR 192 at 202-3.

37 Id at 203.

38 Ibid.

39 C T Mc Cormick Handbook of the Law of Evidence 2ed (1972) 584.

40 Id at 599.

41 Ibid.

42 Falknor, op cit note 36.

43 Morgan "Hearsay and Non-Hearsay" op cit note 12, at 1154.

44 Falknor, op cit note 36, at 204.

45 Id at 207.

46 Id at 206.

47 Id at 208-9.

48 Id at 217.

49 See In re Hine 37 A. 384 (1897).

50 Falknor, op cit note 36, at 206.

51 Judson F Falknor "The Hearsay Rule and its Exceptions" (1954) 2 UCLA LR 43.

52 Id at 47.

53 Judson F Falknor "The 'Hear-Say' Rule as a 'See-Do' Rule: Evidence of Conduct" (1961) 33 Rocky Mountain LR 133.

54 James Bradley Thayer A Preliminary Treatise on Evidence at the Common Law (1898) 529.

55 Falknor, op cit note 53, at 137.

56 Ibid.

57 Ibid.

58 (1962) 14 Stanford LR 682.

59 Id at 686.

60 Morgan "Hearsay Dangers ... ", op cit note 20, at 188.

61 Finman, op cit note 58, at 707-9.

62 Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 353-4.

63 Id at 354.

64 Ibid.

65 Jack B Weinstein "Alternatives to the Present Hearsay Rules" 44 Federal Rules Decisions 375 at 379.

66 See pp 385 to 389 post. See also R Graham Murray "The Hearsay Maze: A Glimpse at Some Possible Exits" (1970) 50 Canadian Bar Review 1 at 9.

67 286 F. 2d 388 (1961); see also p 388 post.

68 At 397-8.

69 Weinstein "Alternatives ... ", op cit note 65, at 380.

70 Ibid. An example of such writers who are opposed to this discretion is Rucker "The Twilight Zone of Hearsay" (1956) 9 Vanderbilt LR 453 at 485, where the learned writer submits that such a discretion "(1) adds to the onerous duties of the trial judge, and (2) is calculated to engender a high degree of uncertainty".

71 Weinstein "Probative Force ... ", op cit note 62, at 353.

72 John M Maguire "The Hearsay System: Around and Through the Thicket" (1961) 14 Vanderbilt LR 741.

73 Id at 768 note 91.

74 Id at 769.

75 Id at 771.

76 Ibid.

77 Stanley Schiff "Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Canadian Bar Review 674 at 676-7.

78 Supra note 77.

79 Id at 674.

80 Ibid.

81 See Chapter III pp 41 to 44 ante.

82 Schiff, op cit note 77, at 679.

83 (1930) 54 CCC 172.

84 See pp 121-5 ante.

85 Schiff, op cit note 77, at 682.

86 [1914] AC 733.

87 [1972] AC 378.

88 The Law Reform Commission of Canada produced a Report on Evidence in 1975. It contained an Evidence Code which dealt with hearsay in sections 27-31. The report was not, however, well received, and was succeeded by a Federal/Provincial Task Force,

set up by the Uniform Law Conference of Canada. This Task Force submitted a Report on Uniform Rules of Evidence in 1981, in which it recommended the adoption of a definition similar to that proposed by the Law Reform Commission. For a fuller account, see the report by the Australian Law Reform Commission Research Paper No 3 (1981) 89-93.

89 Schiff, op cit note 77, at 684.

90 [1970] SCR 608, 14 DLR (3d) 4. A similar approach was adopted in New Zealand in Jorgensen v News Media (Auckland) Ltd 1969 NZLR 961 at 979-80 and 991-4.

91 [1965] AC 1001.

92 14 DLR (3d) 4 at 16.

93 1958 (3) SA 285 (A).

94 At 297.

95 See also Hassim v Naik 1952 (3) SA 331 (A), and generally L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) 97.

96 See p 342 ante.

97 Weinberg, op cit note 1, at 288.

98 Sir Rupert Cross Evidence 5ed (1979) 469 note 1.

99 (1956) 72 LQR 91.

100 [1952] AC 480, [1952] 2 All ER 447.

101 Cross, op cit note 99, at 96.

102 Ibid.

103 Ibid.

104 (1969) 7 Melbourne University LR 1.

105 Id at 12-13.

106 Sir Rupert Cross and Nancy Wilkins An Outline of the Law of Evidence 4ed (1975) 106.

107 Ibid.

108 Weinberg, op cit note 1, at 290.

109 Ibid.

110 Op cit note 98, at 469-473.

111 Id at 472.

112 Id at 472-3.

113 [1952] AC 480, [1952] 2 All ER 447.

114 Wigmore Evidence II 3ed (1940).

115 Id, at para 267.

116 Eustace Seligman "An Exception to the Hearsay Rule" (1912) 26 Harvard LR 146.

117 Id at 148.

118 Ibid.

119 Phipson on Evidence 6ed (1921) - 10ed (1963). See, for instance, the tenth edition at para 636.

120 Rupert Cross "The Scope of the Rule Against Hearsay" (1956) 72 LQR 91 at 100.

121 Phipson on Evidence 13ed (1982) para 16-15 at 344.

122 Weinberg, op cit note 1, at 285.

123 Op cit note 77.

Chapter IX

CODIFICATION : A WAY OUT OF THE HEARSAY THICKET?

It was submitted in Chapter III that the abolition of the hearsay rule in its entirety was unjustifiable, and that the exclusion of some hearsay was economically cost-efficient. In the ensuing discussion, two major enquiries presented themselves:

(1) How should hearsay be defined? If some hearsay warrants exclusion, we should know with some degree of accuracy which evidence falls within the hearsay concept, thus demanding further scrutiny as regards its admissibility.

(2) What criteria may be used to separate that hearsay which should be received from that which should be excluded?

Our common law, riddled as it is with irreconcilable decisions and intractible dogma, would seem to be incapable of yielding satisfactory answers to these questions, and the only solution is to codify our hearsay law. To argue, as some no doubt would, that such a step is unnecessary, because the hearsay rule "works in practice", would seem to be an evasion of the problem. What merit is there in a rule that operates best when it is ignored? The rigours of our hearsay law are mitigated in practice by a seemingly tacit agreement that the full import of the rule is

not to be taken seriously, thus creating a licence for ignorance and abuse. It is submitted that this balm of forgetfulness cannot seriously be advanced as a counter to a scientific codification that would allow the realities of legal practice to square with sound theoretical norms.

In resorting to legislation, we would, in any event, be following the pattern set by other Anglo-American jurisdictions, where the reform of the hearsay rule has been the subject of thorough examination by Law Reform Commissions, resulting, in many cases, in codification. Our tardiness in following this precedent may, however, work to our advantage, as we find ourselves in the enviable position of being able to draw on the experience of these countries, as well as the cases and literature which the evidence codes have spawned. To legislate on so thorny an issue as hearsay is certainly hazardous, and, in many cases, proposed codes have ended ignominiously on the scrapheap. It would be in our interests to learn from such experiences, for it would be regrettable to repeat these errors.

It would no doubt be instructive, therefore, to examine and compare the reform of hearsay law in all the Anglo-American countries, viz. England, Scotland, the United States, Canada, Australia and New Zealand. This, however, would be a formidable task, the adequate performance of which would require a dissertation of its own.[1] For the purposes of the present dissertation, however,

attention will be focussed on only two countries apart from South Africa, viz. the United States and Australia. My reasons for this choice are as follows:

(A) The United States:

(a) Being the largest of the "hearsay jurisdictions", the United States reform programme has affected more people than any other, and has yielded by far the greatest volume of academic comment on the question.

(b) The time span of this reform programme covers over forty years and three major Evidence Codes, compiled by some of the leading writers on the Law of Evidence.

(c) Of these three codes, only the most recent has found recognition, the first two having been rejected out of hand. The reasons for the negative response of legal practitioners may profitably be investigated by any body intent on reform.

(d) The fact that the reform programme in the United States is, for practical purposes, virtually complete, affords us an excellent opportunity to examine the working of these measures in the practice of the courts.

(e) The nature of these reforms is also of great

interest: The Federal Rules of Evidence, the most recent of the codes, adopts a hybrid solution to the hearsay problem, setting out detailed, specific exceptions to the rule, but supplementing them with residual exceptions based on a judicial discretion. Because the desirability and ambit of such a discretion will inevitably lie at the fulcrum of any debate concerning reform of our hearsay law, the United States solution is of great interest and significance.

(B) Australia:

(a) Unlike the United States, where the reform programme has already been completed and implemented, Australian attempts to reform the law are still in embryonic form. Although many of the individual states have legislated in this regard, plans are afoot to draft a comprehensive Uniform Evidence Act, entailing a codification of hearsay law. Australia, therefore, in much the same way as South Africa, finds itself in a position to choose from the various approaches adopted by the other jurisdictions.

(b) As a preliminary step to such reform, the Australian Law Reform Commission has drafted research papers on the hearsay rule, containing various recommendations and setting out the choices confronting the legislature. Two aspects of these

proposals are of particular interest:

(i) the Commission's choice of definition so as to include implied assertions - both verbal and nonverbal - within the hearsay concept;[2] and

(ii) the decision to minimize the judicial discretion,[3] a recommendation which is, in a later paper,[4] reconsidered and left open after a discussion of the relative merits and faults of such an approach.

The reform measures - both enacted and proposed - in the United States and Australia have therefore, in different ways, much to offer us. In what follows, I intend to examine these programmes separately, paying particular attention to two aspects of the reforms:

(i.) the choice of hearsay definition and

(ii.) the employment and scope of a judicial discretion.

(A) THE UNITED STATES

Writing in 1959, a leading Canadian commentator on evidence law was forced to concede the following:

> "As a Canadian, I hesitate to admit it, but it is very clear to me, that in the field of evidence law, a combination of scholarship, determination, good common sense and genius has been at work in the United States for the past half century or more to reform the law, and the fruits of that sustained and combined effort of the bench, bar and teaching profes-

> sion in that country are now available in convenient form and are now being plucked by more than one legally advanced state of the Union." [5]

The American harvest has indeed been rich, and, as the learned writer predicted, the fruits of this laudable effort have been gleaned by an increasing number of states and territories. Largely responsible for this process has been the "convenient form" in which this scientific thought has been wrapped, viz. three evidentiary codes compiled over a period of approximately thirty years. The impact of these codes on hearsay law has been substantial, providing us in South Africa with a solid foundation on which to embark on a programme of reform.

Plans to codify the Law of Evidence, including hearsay, may be traced back to 1942. In that year, the American Law Institute drafted its Model Code of Evidence,[6] the provisions of which, it was envisaged, would supplant the common law and all statutes inconsistent with the Code. These aspirations, however, were doomed to failure. The reception of the Code by the profession, according to one learned commentator,[7] "varied between chilliness and heated antagonism", and it failed to find acceptance in a single state. Largely responsible for this unanimous repudiation, was the erosion of the exclusionary rule on two fronts: First, a narrowing of the definition of hearsay to exclude non-assertive conduct; in terms of Rule 501(1), a statement is not hearsay unless it is either intended to be an assertion, or is offered for a purpose re-

quiring an assumption that it was so intended. Secondly, and more significently, a widening of the exceptions to the rule to such a degree, that the Code "substantially read the hearsay rule out of existence".[8] Apart from a general liberalization of the traditional exceptions, the Model Code created two new far-reaching exceptions which particularly aroused the ire of the conservative legal profession. These are contained in Rule 503, which provides:

> "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination".

Undaunted by the hostile reaction to the Code, the National Conference of Commissioners on Uniform State Laws prepared and published the Uniform Rules of Evidence in 1953. Rule 63 defines "hearsay" as "evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated", while "statement" is defined in Rule 62(1) to include "not only an oral or written expression but also nonverbal conduct of a person intended by him as a substitute for words in expressing the matter stated". The Uniform Rules, therefore, retain and further entrench the narrow assertion-oriented definition of hearsay set out in the Model Code, a definition which has not been universally acclaimed.[9] As regards the exceptions to the rule, however, the Uniform Rules are somewhat more conservative than their much-maligned predecessor. The general excep-

tion relating to statements of unavailable declarants, in particular, is substantially watered down, admissibility now being made conditional upon the judge's finding them to be "made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and made in good faith prior to the commencement of the action".[10]

Despite this concession to traditionalism and conservatism, the Uniform Rules were only marginally more successful than the Model Code, and were adopted, in whole or in part, in only a handful of states or territories.[11] In stark contrast, however, the recently enacted Federal Rules of Evidence have been highly successful. As of the beginning of 1982, twenty-one states had adopted versions of the Federal Rules,[12] prompting one writer to remark that "before long states without a similar evidence code will be exceptional".[13] To what may this unprecedented popularity be ascribed? Wellborn submits that the major reason is the orthodox, traditional approach which the drafters chose to follow, flavouring the Rules with an "intrinsic characteristic of proven market value".[14] Professors Wright and Graham, in fact, in their treatise on federal procedure,[15] call the Rules "not a true codification but simply an authoritative compilation of the caselaw", maintaining that "it is difficult to see how adoption of the Federal Rules will improve the law of any state".

Before adopting this approach, the Advisory Committee considered three possible solutions to the hearsay question: [16]

(1) Abolish the rule against hearsay and admit all hearsay. This, the Committee conceded, would be the simplest solution", but one which would require some qualification. It should not be allowed to abolish automatically "the giving of testimony under ideal conditions"; if the declarant were available, then compliance with these ideal conditions should be made optional with either party. What, however, if the declarant were unavailable? The Committee considered Rule 503 of the Model Code, which made "no distinctions in terms of degrees of noncompliance with the ideal conditions" and which exacted "no quid pro quo in the form of assurances of trustworthiness", and concluded that it was "unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant". Furthermore, the Committee added, if the hearsay rule were abolished, the confrontation clause of the Sixth Amendment would, in criminal cases, still operate to exclude much hearsay evidence. This would create a split between civil and criminal evidence which the Committee felt to be an "undesirable development".

In rejecting this solution, the Advisory Committee was no doubt greatly influenced by the hostile reception

of the ill-fated Model Code. In this regard, we in South Africa would do well to learn from the American experience. The legal profession is notoriously conservative and would not welcome the demise of so well-established a bastion of evidentiary law. Even if legislation were enacted to abolish the rule, it is unlikely that judges, inured to the system of excluding hearsay, would attach much, if any, weight to such evidence. Furthermore, as the Advisory Committee observed, the abolition of the hearsay rule would require some qualification, particularly where the declarant is available to be called as a witness.

The Committee's comments concerning the confrontation clause in the Sixth Amendment should not be regarded as being totally inapplicable to us in South Africa. The fact that we do not have such a clause, and that the abolition of the hearsay rule would not create a "split" between civil and criminal evidence, does not reduce the need for such a principle in criminal cases. At present, this need is served - albeit inadequately - by the hearsay rule, and the abolition of this rule would serve to exacerbate the problem instead of remedying it.

(2) Admit hearsay possessing sufficient probative force, but with procedural safeguards. This approach entails abandonment of the existing system of class exceptions in favour of individual treatment of each item of evidence in a particular case, an approach which,the Committee pointed

out, has been "impressively advocated" by leading academic commentators.[17] Admissibility would be determined by "weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence", and the traditional hearsay exceptions would merely be factors to be considered in assessing probative force. This approach would, the Committee opined, require some procedural safeguards, such as "notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight".

Despite the obvious merits of this solution, the Advisory Committee rejected it on the grounds that it was unsuitable, "involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pre-trial procedures, and requiring substantially different rules for civil and criminal cases". Furthermore, the Committee added, the probative value of hearsay only differed from the probative value of original evidence in one respect, viz. the absence of the oath, cross-examination and demeanour as aids in determining credibility; to exclude evidence on this ground, merely because the judge does not believe it, would be "altogether atypical" and "extraordinary".[18]

The last-mentioned comment of the Committee is particularly difficult to comprehend in the light of its adoption of solution (3) (below). To reject a discretionary power to exclude hearsay on the grounds mentioned above in favour of a general exclusionary rule accompanied by a series of defined exceptions would seem to be irreconcilable with this view of hearsay theory. If the absence of the standard procedural safeguards is insufficient to justify the exclusion of hearsay in respect of solution (2), then it is surely an even less adequate justification for expounding a general exclusionary rule as laid down in solution (3). The exclusion of at least some hearsay is either justifiable or unjustifiable, and the machinery effecting this exclusion - whether it be a judicial discretion or a general exclusionary rule - can have no bearing on this preliminary issue.

The other reasons furnished by the Committee for rejecting this solution are, it is submitted, either similarly unconvincing or inapplicable to South Africa. Consider these objections individually:

(a) This solution involves too great a measure of judicial discretion and minimizes the predictability of rulings: Judge Weinstein once commented, rather wryly, that "[s]ome lawyers prefer a precise bad rule to a discretionary good one",[19] and, while the learned writer expresses some sympathy with the objections such lawyers had towards

a discretionary power, he finds himself unable to share their mistrust of its fairness and certainty. The force of their objection, he adds, can moreover be reduced by requiring "notice in advance when hearsay intended to be used does not fall within one of the standard exceptions".[20] Where the need for such hearsay only becomes apparent at the trial itself, however, the court should again have a discretion to dispense with the requirement of notice in appropriate cases. While this approach is not, as the learned writer himself concedes, without its faults, its inherent flexibility would seem to be far more conducive to the attainment of justice than the "Victorian rigidity"[21] of the traditional approach, which at times seems to resemble a game of Russian roulette in the arbitrary and capricious way it separates admissible and inadmissible hearsay.

(b) It enhances the difficulties of preparation for trial and adds a further element to the already over-complicated pre-trial procedures: No doubt the requirement of notice of intention to tender hearsay evidence will increase the pre-trial burden of counsel, but this would not seem to be an insuperable obstacle. Where a party wishes to call an expert to express an opinion, our rules of court in South Africa require that he give his opponent at least fourteen days notice of his intention to do so, and, in addition, deliver to his opponent a

summary of the expert's testimony at least ten days before the hearing.[22] Our courts have held, however, that these rules do not preclude an expert, in appropriate cases, from testifying where notice has not been given.[23] Similar rules could be devised for dealing with hearsay evidence, and, as in the case of expert testimony, they would not be likely to cause much difficulty. Any increase in counsel's pre-trial burden would be more than offset by the increased facility with which he could prove his case.

(c) It would create different rules for criminal and civil cases: Because of the absence of a constitutional confrontation clause, this objection is inapplicable to South Africa.

The reasons of the Advisory Committee for rejecting solution (2) would therefore seem to be somewhat questionable. Perhaps the most important reason for their decision, however, was one not expressly stated in their notes to Article VIII, viz. a reluctance to risk arousing again the ire and mistrust of the legal profession. The failure of the Model Code and the Uniform Rules to win acceptance can never have been far from the drafters' minds while drafting the Federal Rules, and many choices between conventionalism and innovation must surely have been resolved in favour of the former through haunted memories of these two lingering ghosts of American evidentiary law reform.

(3) Retain the common law approach but revise the present system of class exceptions. As intimated above, this was the solution adopted by the Advisory Committee: the traditional hearsay exceptions were collected under two rules, one (Rule 803) dealing with situations where the availability of the declarant is regarded as immaterial, and the other (Rule 804) with situations where the reception of hearsay is made conditional on the unavailability of the declarant. Each of these rules ends, however, with a residual exception providing for the admission of hearsay which does not fall within one of the specified exceptions,[24] but in respect of which there exist "equivalent circumstantial guarantees of trustworthiness" provided (a) that the proffered assertion tends to establish a material fact; (b) that it is more probative on the question at issue than other reasonably obtainable evidence; and (c) that its admission serves the "purposes of the rules" and the "interests of justice". It is further provided that these residual exceptions may only be used to receive such evidence if the adversary is given notice sufficiently in advance of the hearing to provide him with "a fair opportunity to prepare to meet it".

Two aspects of the Federal Rules call for specific attention and closer scrutiny, viz. the residual provisions contained in Rules 803(24) and 804(b)(5) and the definition of hearsay in Rule 801.

(I) The Residual Hearsay Exceptions

The history of these exceptions makes interesting reading,[25] and demonstrates clearly the strength of the forces of conservatism and traditionalism. In the preliminary draft of the Rules in 1969,[26] it was provided that all hearsay statements having assurances of accuracy "not likely to be enhanced by calling the declarant as a witness" would be admissible, and the present exceptions were merely enumerated as illustrative examples of this general principle. When the final text of the proposed Rules was drafted in 1971, however, it was decided to revert to the traditional approach, and the illustrations became specific exceptions. Residual exceptions were added to Rules 803 and 804, however, which provided for the admission of other hearsay statements "having comparable circumstantial guarantees of trustworthiness". In this liberal - although slightly watered-down-form, the Supreme Court adopted the Rules and submitted them to Congress.

The two residual exceptions found little favour with the House Judiciary Committee, however, and both were deleted entirely as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial.[27] The Senate Judiciary Committee, on the other hand, felt that without separate residual provisions, "the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include", and accordingly reinstated

them.[28] The Committee felt that evidence such as that admitted in the case of Dallas County v Commercial Union Assoc. Co. Ltd.,[29] which was found to have a "high degree of probativeness and necessity", should be admitted despite the fact that it does not fall within one of the established exceptions to the rule. However, they added, these residual exceptions should enjoy a far narrower scope than the version adopted by the Supreme Court, and eventually the Rules emerged in their present form, subject to the four prescribed conditions of admissibility set out above.

Conservatism and orthodoxy had once more won the day, and, to put the issue beyond all doubt, the Senate Judiciary Committee added the following injunction to its report:

> "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule."[30]

The criteria of reliability and necessity, therefore, after starting out as the primary yardsticks for admissibility, ended up as legislative after-thoughts, cautiously

and almost reluctantly appended to a set of specified hearsay exceptions, and qualified by four carefully formulated conditions, lest "an overly broad residual hearsay exception ... emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules".[31] This compromise, it was envisaged, would "encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future".[32] Whether this objective has been achieved, is, however, the subject of some debate among American commentators.[33]

Edward J Imwinkelried, in an article in which he assesses the various possible interpretations of the residual exceptions, submits that they at best preserve the pre-Rule common law power of the federal trial judge and at worst derogate from such power.[34] The residual exceptions, he argues, while seemingly most revolutionary, are in fact most traditional. In support of this contention, the learned writer examines the case law both before and after the adoption of the Federal Rules.

(a) Before the Rules:

"The forte of the common law", says Imwinkelried, "has always been its capacity for evolving new doctrines based on accumulated judicial experience".[35] This capacity manifested itself in the field of hearsay law in the emergence of a judicial discretion to admit hearsay that eluded

a recognized exception. The basis for such a discretion was derived by identifying two common denominators to the common law exceptions, viz. circumstantial probability of trustworthiness and necessity, criteria which were employed by Wigmore [36] to rationalize the entire system of exceptions.

The first signs of this trend took place in the 1950's in New Hampshire, where Wigmore's criteria found implicit approval, and soon afterwards in other states, including New York.[37] In the 1960's, the federal courts endorsed this practice, admitting evidence on the ground that it was "fundamentally reliable" or conformed to "the general policies underlying the exceptions to the hearsay rule".[38] In some cases, Wigmore's dual test was expressly invoked, inducing the court to conduct a careful investigation into the hearsay dangers involved, the circumstantial indicia of reliability present on the facts of the case, and the need for such evidence.

In United States v Barbati,[39] the accused was convicted of passing a counterfeit bill to a barmaid. At the trial, the barmaid was unable to identify the accused as the person who had handed her the bill, but a policeman was allowed to testify that she had identified the accused shortly after the event. It was argued that such evidence was not hearsay, but Judge Weinstein preferred the "more realistic" view that it was, since "its use re-

quired reliance upon all elements of her credibility - observation power, memory, truthfulness and ability to communicate".[40] Having thus classified the evidence, he found that it was "not necessary to decide whether it falls within a specific hearsay exception",[41] as the "current clear tendency" is for federal courts to admit hearsay "when it is highly reliable, highly probative, and where the opponent has an adequate opportunity to attack it".[42]

Turning to the facts of the case, the learned judge found that "there is no more satisfactory evidence available, probative force is high, and availability of the hearsay declarant for cross-examination makes the possibility of prejudice slight".[43] On the question of reliability, he carefully considered all the hearsay dangers, and found them to be properly accounted for:

> "The statement of the barmaid identifying defendant was spontaneously made within a few moments of the time the bill was passed and while defendant was still in his place at the bar. It is unlikely that her observation of the man who gave her the bill was mistaken - he was awaiting her return with his change. There was no time for lapse of memory. No reason for her to lie was suggested; in any event, any motive she might have had to falsify, would not have been substantially different at the trial than it was at the time of the event. The process of pointing out the defendant was so simple that an error in communication was improbable. The barmaid was unlikely to have remained silent if the police had collared an innocent bystander rather than the man she intended to point out." [44]

In the course of his judgment, Judge Weinstein referred to

the decision in Dallas County v Commercial Union Assurance Co,[45] which Imwinkelried describes as "[e]asily the most famous federal case embracing Wigmore's criteria".[46] The Dallas County case was certainly a seminal decision on the ambit of the pre-Rule judicial discretion, the philosophy behind which was subsequently tersely stated in United States v Castellana:[47] "We are loath to reduce the corpus of hearsay rules to a straight-jacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the reliability of the proffered evidence".

The high-water mark of this approach was reached, however, in 1971, in the decision of the Court of Appeals for the Fourth Circuit in Chestnut v Ford Motor Company.[48] The court was required to consider the admissibility of a statement made by one of the parties which had been tendered as a "spontaneous exclamation", which, it was argued, constituted a recognized exception to the hearsay rule. On the question of this categorization, the court expressed the following view:

> "For purposes of convenience we use here the term employed by Wigmore to describe the rule that has been applied to admit hearsay statements of accident victims, 'spontaneous exclamation.' But we recognize that the modern trend is to ignore labels of this type completely and concentrate on two factors that underlie most exceptions to the hearsay rule: (1) the necessity of accepting hearsay testimony rather than direct testimony subject to cross-examination; (2) the circumstantial probability of trustworthiness of the hearsay statement."[49] (Italics added.)

The hearsay straight-jacket, had, it seemed, been torn asunder, but the general satisfaction accompanying its demise was destined to be short-lived.

(b) After the Rules:

The legislative history of the residual exceptions in the Federal Rules did much to revive old fears, and it seemed at one stage that the proposed discretionary provisions would never see the light of day. When they did eventually emerge, after a painful and hazardous delivery, they were severely constrained by five qualifying requirements and an injunction by the Senate Judiciary Committee that they be employed "very rarely and only in exceptional circumstances".[50] How then have the courts construed these provisions in the light of the pre-Rule liberation of hearsay at the hands of the courts?

Generally, Imwinkelried finds, the "cases construing the residual exceptions assume sub silentio that even after the Rules' adoption, the courts have the same degree of discretion to admit hearsay which does not fall within an orthodox exception".[51] This is borne out by the extent of the reliance placed in many post-Rule cases[52] on leading pre-Rule decisions, such as Dallas County and Chestnut, and, where such cases are not expressly cited, by their inclination towards the "pre-Rule tendency to place primary emphasis on the testimonial quality of sin-

cerity in determining the admissibility of hearsay".[53] However, the learned writer adds, despite this general belief in the survival of the judicial discretion, the courts seem to have applied the residual exceptions cautiously. In many cases, these exceptions are cited merely as alternative grounds for admission,[54] while, in others, the courts have gone as far as saying that they should only rarely be employed.

In Lowery v Maryland,[55] the statement of one Dixon was tendered as a statement against interest in terms of Rule 804(b)(3), and, alternatively, under the residual exception, Rule 804(b)(5). The court held that the statement did not qualify as a statement against interest, and turned to the alternative argument. This, it found, was defective, as it ignored "the first of the four necessary conditions to admissibility, ie, the statement must have equivalent circumstantial guarantees of trustworthiness as the other hearsay exceptions".[56] Turning to the general scope of the residual provision, the court declared that "[i]t was the intent of Congress that this exception be used rarely and only in exceptional circumstances", and concluded that, "[s]ince statements such as Dixon's are covered by Rule 804(b)(3), the admissibility cannot be considered under 804(b)(5)".[57]

This restrictive approach found varying degrees of approval among the divided bench in United States v Medico,[58]

an appeal from a decision of Judge Weinstein to admit double hearsay identification of a getaway car under the residual exception in Rule 804. The majority took cognizance of the Senate Judiciary Committee's instruction that such exception be used only in "rare and exceptional circumstances",[59] but found that, as the evidence satisfied the specific conditions of Rule 803(1), it was "consonant with the legislative purposes which the residual exception was designed to achieve".[60] It was found, moreover, that the evidence contained sufficient indications of reliability, which were "on par with those which justify the ennumerated exceptions".[61] Judge Mansfield, however, opined that the "admission of the double-hearsay identification of the getaway car in the present case violated both the spirit and purpose of FRE 804(b)(5) as thus expressed, since the evidence failed to satisfy any of the basic conditions for exceptions to the hearsay rule".[62] In his view, it "lacked any circumstantial guarantee of trustworthiness", was "hardly 'more probative on the point for which it is offered than any other evidence which the proponent can procure'",[63] and its reception was not in the interests of justice. In the light of the drafters' request that the residual exceptions be used sparingly, the learned judge concluded, therefore, that resort to Rule 804(b)(5) by the trial judge was "a serious error", the effect of which would be "to emasculate the hearsay rule and violate the funda-

damental purposes underlying it".[64]

A case which conflicts starkly with this approach is United States v American Cyanamid Co.[65] In order to ascertain the accepted meaning of "production capacity" in its industrial sense, the Cyanamid Co. had conducted an enquiry among various producers of its product, viz. melamine. The company then sought to tender in evidence, under Rule 803(24), the responses of the producers, in order to show that it had not dishonoured its agreement to limit its production of melamine until its competitors had increased their "production capacity" by a determined annual amount. The government contended that the evidence should be excluded, arguing that the Senate Judiciary Committee's report had limited the application of Rule 803(24) to exceptional cases. The court, however, rejected this argument, stating that the text of the Rule does not require "that the Court find a case to be 'exceptional', whatever that means, in order to receive any evidence".[66] Such a construction, the court added, would negate the requirement of Rule 102, which encourages a liberal interpretation of the Rules, and would render the application of the discretionary exception uncertain. Instead, the court added, one should look only at the specific requirements of the Rule, which contains "sufficient express criteria which must be satisfied before an item of hearsay will be admissible".[67]

Of the two approaches apparent in the case law, Imwinkelried prefers the more progressive view expounded in the American Cyanamid Co. case. No doubt, he concedes, any supporter of the Senate Committee's report would find this opinion "not only unacceptable but infuriating".[68] However, he submits, despite this ostensible inversion of the legislative history of the residual discretions, the court in that case reached "the proper conclusion",[69] and the approach favoured in cases such as Lowery, Medico and others is "bad in law".[70] His reasons for this seemingly heretical view are as follows:

1. The Senate Report, although it states that the exceptions should be used "very rarely and only in exceptional circumstances",[71] is not unequivocal in this demand. It cites, for instance, the cases of Dallas County and Barbati,[72] two of the most far-reaching decisions on the ambit of the discretion at common law, and states that federal trial judges, in applying the residual exceptions, are to use "no less care, reflection, and caution than the courts did under the common law".[73] This ambivalence, Imwinkelried submits, may be the product of political expedience, the final text of the exceptions having been a political compromise between Congress and the Senate. This, he argues, somewhat deflates the "legislative history" argument commonly forwarded to support the restrictive construc-

tion of the exceptions, and opens the way for the more liberal view set out by the court in American Cyanamid.

2. The broad construction is more literal, giving vent to the specific words used in the text.

3. This interpretation is more purposive and consistent with the overall purpose of Article VIII, which is to liberalize federal hearsay practice. To adopt the narrow construction would be a step backward, giving federal trial judges less discretion than they had at common law.

4. The Cyanamid approach is also more reasonable. It would be absurd, the learned writer points out, to insist upon extraordinary probative value in respect of hearsay submitted under the discretionary provisions, when we do not require such quantum of value in respect of the hearsay we routinely admit.

The approach advocated by Imwinkelried, therefore, has much merit. It seems to strike a satisfactory balance between the "values and experience of the past" and the creative innovation needed for the future. The appeal of this approach lies in the fact that it has its roots in the common law while remaining true to the overall purpose of the Federal Rules. However, this view has enjoyed scant judicial support, most of the cases having preferred the more reactionary view followed in Lowery

and Medico, and herein lies a lesson for all would-be reformers of the hearsay rule: the legal profession is generally a very conservative one, and is reluctant to espouse radical doctrinal changes to the law. Examples of this inertia have been encountered throughout this discussion of the American attempts to reform the hearsay rule, such as the hostile reaction to the liberal provisions in the Model Code and the Uniform Rules, the legislative history of the residual exceptions in the Federal Rules, and their subsequent treatment at the hands of the courts. The breadth of vision and creative flair exhibited by jurists such as Judges Wisdom and Weinstein would seem to be the exception rather than the rule, and drafters of reform proposals should keep in mind that their handiwork is likely to be construed by lawyers and judicial officers less inclined towards innovation or expansive thought.

It should be borne in mind, therefore, that any attempt to create a broad, discretionary basis for admissibility of hearsay in South Africa would probably be thwarted by a reversion to the principles of the common law. It would seem, paradoxically, that to create a wider base for admissibility, a more comprehensive provision, qualified by rules or guidelines, is likely to be more successful than a tersely-stated general provision that allows for an unfettered discretion.

On the other hand, a discretion that is qualified by ex-

haustive conditions gives rise to major problems of interpretation. The United States federal courts have encountered this problem, as, in determining the admissibility of an item of hearsay evidence tendered under the residual provisions, they are constrained by the specified conditions set out in these exceptions. It has therefore fallen to the courts to interpret these conditions and to establish their precise ambit. The ensuing difficulties have prompted one writer, D A Sonenshein, to remark that "[o]nly when agreement is reached on the standards to be applied will the goal of the residual exceptions - to provide for the growth and development of the law of hearsay without importing too much uncertainty into the hearsay rule - be realized".[74] In support of this observation, he examines the conditions set out in the residual exceptions, viz. trustworthiness, probativeness, the interests of justice and notice, and demonstrates how the federal courts are divided on the interpretation of each. By way of example, it is instructive to examine briefly his comments on the interpretation of the first - and, possibly, the most important - of these conditions, viz. trustworthiness.

The residual exceptions prescribe that the proffered hearsay statement must possess circumstantial guarantees of trustworthiness which are equivalent to the explicitly recognized exceptions to the rule. This "general

language", says Sonenshein, has "inspired the judicial formulation of three independent standards"[75] against which to measure such trustworthiness:

(1) One test is to restrict the enquiry to factors extrinsic to the evidence itself. Such factors include the availability of the declarant at trial, corroboration of the statement by other admissible evidence, and the admission by the declarant at trial of having made the statement.[76]

(2) The second approach discernible from the case law is to restrict the ambit of the investigation to circumstances surrounding the making of the extra-curial statement. Examples of such factors which have been used by the courts to gauge trustworthiness are as follows:

(a) Factors used to confirm trustworthiness:
The short time lapse between the event and the statement describing it; the fact that the statement was made voluntarily; the fact that the statement tended to implicate its maker in a crime; the making of the statement under oath; the fact that the statement was based on personal knowledge; the fact that the statement was made by a disinterested person or official; the richness of the detail contained in the statement; the fact that a written statement was edited and corrected by its maker; and the lack of a motive to falsify.[77]

(b) Factors used to negate trustworthiness:

The fact that the statement was made during dispositional negotiations, or in an attempt to curry favour with the authorities, or in the hurly-burly of legislative politics, or for litigation purposes, or in fear of physical harm, or by a person known to be a braggart; the fact that the statement was later recanted; and the strong personal relationship between the declarant and one of the parties.[78]

(3) The third standard is a combination of the first two, reflecting those cases where the courts have examined both extrinsic and intrinsic indicia of trustworthiness.[79]

Of these three approaches, Sonenshein prefers the second, arguing that the other two are based on a misperception of an important premiss of the residual exceptions. These provisions insist on guarantees of trustworthiness which are equivalent to those effected by the enumerated hearsay exceptions contained in the rules. These exceptions revolve around the reliability factors inherent in the making of the statement, and do not refer to extrinsic corroboration. The same criteria, Sonenshein argues, should therefore apply to the enquiry required by the residual exceptions. As the learned writer observes, moreover: "The vice of hearsay is that the out-

of-court declarant cannot be cross-examined when the statement is made; the fact that hearsay evidence is corroborated at trial does not correct this vice." [80]

A further interpretative difficulty ensuing from this trustworthiness requirement is presented by what Sonenshein describes as the "near-miss situation",[81] where a proffered statement is in the realm of a specific exception but just falls short of satisfying such exception because it is deficient in one or more of the prescribed conditions. Some courts have held that where such evidence complies with the spirit, if not the letter, of these exceptions, admissibility may be appropriate under the residual exceptions.[82] Others, however, have held the failure of such evidence to satisfy the specific requirements of an enumerated rule as precluding a finding of adequate trustworthiness.[83]

Similar problems of construction beset each of the prerequisites to admissibility contained in the residual provisions, a legacy of Congress's insistence that the judicial discretion be fettered and qualified. As a result, the courts have "strayed from the congressional intent" and have "generated uncertainty by misinterpreting and misapplying the residual exceptions".[84]

The above analysis of the residual exceptions has, therefore, yielded two vital legislative lessons:

(1.) The creation of a broad, unqualified discretion to

admit hearsay tends to meet with opposition at the hands of the generally conservative legal profession and, moreover, tends to be counter-productive, in that the absence of legislative guidance induces the courts to resort to the safety of the common law.

(2.) A discretion which is exhaustively qualified by a closed list of specified prerequisites, on the other hand, is also unsatisfactory, as it tends to generate problems of interpretation and to create tension between the original legislative intent and the growth necessary to accommodate legal development.

The solution, it would seem, lies in the creation of a judicial discretion which is qualified by a non-exhaustive set of factors which draw attention to the intrinsic hearsay values, but which are not allowed, individually, to obscure the overall enquiry of whether the admission of the evidence is desirable. The precise structure of such a qualified discretion will be considered at length below.[85]

(II) The Definition of Hearsay in the Federal Rules

Another controversial feature of the Rules is the choice of definition in Rule 801. The relevant provisions are set out as follows:

> (a) Statement. - A "statement" is (1) an oral or

written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. - A "declarant" is a person who makes a statement.

(c) Hearsay. - "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The Advisory Committee[86] on the proposed Rules considered five categories of evidence to which the hearsay label has commonly been applied:

(i) Verbal assertions: These, the Committee stated, "readily fall into the category of 'statement'", provided the verbal communication was intended by the declarant to be an assertion.

(ii) Nonverbal conduct that is assertive in nature: The Committee considered the example of one who points to identify a suspect in a lineup, and observed that this is "clearly the equivalent of words, assertive in nature, and to be regarded as a statement".

(iii) Nonassertive nonverbal conduct: This category refers to evidence of non-verbal conduct that is "offered as evidence that the person acted as he did because of his belief in the existence of the condition

sought to be proved, from which belief the existence of the condition may be inferred". It is arguable, the Committee conceded, that such evidence falls properly within the hearsay concept, in that it is "untested with respect to the perception, memory, and narration (or their equivalents) of the actor", but this was not considered sufficient to warrant incorporation within the definition of hearsay in Rule 801, because

> "the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free from the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence."

(iv) Nonassertive verbal conduct and (v) "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted", referred to by Wellborn [87] as "assertions used inferentially": Both these categories are summarily dismissed by the Advisory Committee as being governed by "[s]imilar considerations" as those relating to nonassertive nonverbal conduct, and, therefore, also to be excluded from the definition of hearsay in Rule 801(c).

Academic response to the decision to exclude the last

three categories of evidence from the ambit of the definition of hearsay has been mixed. Barton and Cowart,[88] in a lengthy article in which they discuss all the provisions of the Federal Rules on the question of hearsay, welcome the decision to exclude implied assertions from the definition as being a step "resolving one of the most troublesome issues surrounding the common law of hearsay".[89] They cite with approval the above passage in which the Advisory Committee furnished its reasons for this restrictive definition, and add that this is in line with the modern trend in the United States to admit implied assertions as being circumstantial evidence of the fact inferred.[90]

Another advocate of the definition of hearsay set out in Rule 801 is Susan R Kelly,[91] who maintains that the problems that arise in respect of the Rule's treatment of implied assertions are capable of being remedied by other provisions of the Federal Rules. The main problem, she argues, is that the definition "aims primarily at eliminating evidence presenting a danger of mendacity",[92] a danger which the drafters believed could adequately be accounted for by confining the hearsay label to statements or conduct not intended to be assertive. This leaves unassailed the other recognized hearsay dangers, which are, moreover, those which cross-examination is most effective in exposing. The solution, the learned writer submits, is to be found in Rule 403, which empowers a court to ex-

clude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence".[93] This Rule, it is argued, may be used to exclude evidence "when the inferential chain becomes extended",[94] as in the case of implied assertions, in which case the court should determine "whether the trier of fact can properly evaluate the evidence, considering whether the circumstances indicate that the actor's perception and memory were reliable, whether the event in question is the most probable explanation for his state of mind and ensuing act, and whether the trier of fact is a jury of laymen or the judge himself".[95]

Much of the academic comment on the choice of definition in the Rules has, however, been far from euphoric.[96] Blackmore, for instance, in an article entitled "Some Things About Hearsay: Article VIII",[97] discusses the definition in Rule 801 under a heading, "Bad Hearsay Things",[98] and demonstrates the inadequacy of this definition by considering the following example: In terms of the restrictive definition adopted, evidence that a driver, having first stopped, proceeded through an intersection controlled by a traffic light, would be admissible on the issue of whether the light had changed. This would not be affected by the fact that the driver's perception

may be faulty because, the learned writer adds somewhat cynically, "there was obviously no intent on the part of the driver to tell the world, 'Look folks, the light turned green'."[99]

More vociferous still in his criticism is Stewart,[100] who, after considering the reasons advanced by the Advisory Committee for leaving implied assertions out of its hearsay definition, found them "faulty on almost every point".[101] He directs his attack at four aspects of the definition: (a) It does not afford a proper analysis of need and reliability, which is possible only if nonassertive conduct is defined as hearsay; (b) it rests on the unjustifiable assumption that nonassertive conduct evidences a more reliable belief than does assertive conduct - "[t]o their dismay people frequently act upon erroneous perceptions and beliefs";[102] (c) it glosses over the difficulty of ascertaining the particular belief that underlies a particular nonassertive act - "[b]ehaviour of children who taunt an old lady may be based on numerous beliefs other than insanity";[103] and (d) it rests on the doubtful proposition that people are "more likely to lie than engage in deceitful conduct".[104] If the definition were formulated so as to include implied assertions, he concludes, "the focus of analysis would shift to inherent reliability and the need to condition the admissibility of that evidence upon a showing that the declarant is unavailable for cross-exami-

nation, the oath, and demeanour evidence".[105]

Most implacable of all the opponents to the definition in the Federal Rules is, however, Wellborn, who describes "the attempt to delete from the hearsay concept all out-of-court verbal expressions that are not simple, direct assertions of the matter they are offered to prove" as "a novelty so unsound, both in principle and in practice, that one cannot help but surmise that the Committee did not fully understand the results of its handiwork".[106] The problem, according to Wellborn, is that a hearsay problem exists "whenever the belief of a human being other than the witness is used as evidence" thus necessitating a comprehensive definition of hearsay to take account of "all the ways in which human beliefs can be communicated".[107] Such an all-embracing notion of hearsay, he adds, was adopted by the English courts in Wright v doe d Tatham,[108] where the court accepted that nonassertive verbal conduct fell within the scope of the hearsay rule. Baron Parke, moreover, in a famous dictum, accepted that nonassertive nonverbal conduct should be similarly treated, thereby effecting a conflation of two distinct problems that Wellborn describes as "truly historic, in the sense of consequential"[109] in that it triggered off a series of decisions and culminated in "the present mishap, the unwholesome hearsay definition in the Federal Rules of Evidence".[110]

Wellborn examines Baron Parke's "expansive definition of

hearsay",[111] and finds that it is sound as a matter of principle. Critics who have attacked the labelling of nonassertive nonverbal conduct as hearsay on the ground that it presents fewer or reduced hearsay dangers than verbal assertions have, he submits, "failed to make a persuasive case". Their arguments are normally based on questionable adages such as "actions speak louder than words" and "talk is cheap", and do not overcome Finman's observation that "not all conduct evidencing a belief is sufficiently important to circumstantially evidence the reliability of the memory and perception on which the belief is based".[112] Where there <u>are</u> such circumstantial safeguards, a strong case exists for regarding the evidence as exceptionally admissible, but it is no argument for wholesale treatment of the entire class of nonverbal nonassertive conduct as non-hearsay. Conduct, furthermore, raises greater dangers of accidental miscommunication, as the risks of ambiguity are normally much greater when belief is inferred from actions rather than words.

In principle, therefore, one cannot quibble with Baron Parke's approach. However, Wellborn continues, "[p]rinciple is not the only consideration in devising legal rules for human consumption",[113] and one has further to determine the feasibility of adopting this approach in legal practice. It has been pointed out "that very often, probably more often than not ... the hearsay objection to evidence of nonassertive conduct is overlooked in practice with the

result that the ... doctrine operates very unevenly",[114] an observation which prompts Wellborn to pose the following question: "Even though there are hearsay risks in this category of evidence, risks perhaps as great on the average as those of verbal hearsay, is the magnitude of the problem such that the aggregate of these risks justifies taxing our three-pound brains in the effort to eliminate them - when experience tells us that, unless we all wax as clever in the courtroom as Baron Parke in his chambers, the effort will succeed only 'unevenly'?"[115] To answer this question in the negative, as the drafters of the Federal Rules seem to have done, is, therefore, according to Wellborn, "an innocuous concession that at least has a plausible justification on grounds of convenience".[116] Their error, he maintains, was in according the same treatment to nonassertive <u>verbal</u> conduct.

Once again, Wellborn approaches the problem from a dual perspective of principle and practicability. As regards the first consideration, he finds the case for labelling nonassertive verbal conduct as non-hearsay even weaker than that concerning nonverbal conduct. Whereas the danger of "concealed assertive intent" may be somewhat remote in the latter category, it is much more significant in the former, as "it is the nature of speech - unlike acts - to convey thought and information".[117] On the question of practicability, further, he submits that the

"problem of inconsistent recognition"[118] is less likely to occur, as a witness's reference to another's statements - as opposed to conduct - triggers the hearsay objection as an almost automatic response.[119]

While I agree fully with Wellborn's submissions concerning nonassertive verbal conduct, I have reservations about dismissing the Committee's treatment of nonverbal conduct as merely an "innocuous concession". The fact that the hearsay doctrine operates "unevenly" in respect of this type of evidence - as, indeed, it seems to do in almost every other type of evidence - merely bears testimony to the unworkable state of the hearsay rule in its present form, a fact that is universally recognized. If the hearsay concept were clearly defined to include nonassertive conduct - whether verbal or nonverbal - this problem would surely be alleviated. The uncertainty concerning the borders of hearsay is perhaps a greater impediment to consistent results than the inability of counsel to "wax as clever in the courtroom as Baron Parke in his chambers". Moreover, even if we were to assume that an expansive statutory definition of hearsay would not guarantee consistency, would this by itself be sufficient to warrant excluding nonverbal conduct from the definition when one takes into account what Wellborn concedes to be its "dubious" theoretical justification? Would it not be preferable to have at least some cases where the court is

called upon to consider the hearsay issues involved than none at all? The counter-argument that the court would thereby be deprived of valuable evidence would, of course, be unanswerable in terms of the present law, but, if the labelling of evidence as hearsay is seen as a warning buzzer rather than an automatic sword of excision, then this objection would fall away.

Wellborn turns next to a consideration of the wording of Rule 801, and finds that, besides being theoretically unsound, it "is fraught with ambiguity and complexity".[120] Academic commentators, he observes, are not in agreement as to how Rule 801 should be interpreted, largely because of the absence of any definition of "assertion" in either the Rule itself or the Committee's Notes. Accordingly, three schools of thought have emerged:

(a.) Only direct, literal assertions are hearsay:

If the word "assertion" is given its standard, dictionary meaning,[121] then only a declarative sentence, the terms of which affirm positively the matter it is offered to prove, can qualify as a hearsay "statement" in terms of the Rule. This, says Wellborn, would seem to be the most plausible interpretation of the term, although it is also the least attractive. It is also the interpretation that most commentators have accepted,[122] although its doctrinal repugnance has caused many to resist it.

(b.) Hearsay includes statements which, although not direct assertions of the matter sought to be proved, were intended to be assertive thereof:

This approach, which is less mechanical than that in (a.) above, finds support in the Advisory Committee's Note, where it is stated that "[t]he effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one." [123] (Italics added.) Certainly, as Wellborn points out, "[s]ome resort to the declarant's intent will undoubtedly be necessary if rule 801 is to work at all in the real world of human language",[124] as the results yielded by the literal meaning approach are arbitrary and intolerable. The problem, however, is that intention, being a subjective concept, is extremely difficult to determine. This presents no problem where the fact sought to be proved is a necessary implication of the literal statement - for instance "it will stop raining in an hour" [125] necessarily implies "it is raining now" - but the question becomes more complex when it is only a probable or possible inference. Is, for example, the statement "it has been raining a lot here now" or "you will get wet if you don't take an umbrella now" intended to be assertive of the fact of present rain? [126]

At the heart of this problem lies one basic question: If

hearsay is to include, as the Advisory Committee seems to indicate it does, conduct intended as an assertion, what meaning must be given to the word "intention"? Professor Ball [127] suggests that it be given a liberal interpretation, in that a person must be taken to have intended to assert Y if he states X but realizes Y at the time of utterance. This in effect restores the approach in Wright v Tatham, for, as the learned writer points out, "[i]f someone had interrupted the men who were writing the original letter to John Marsden and asked them 'Do you realize you are writing to him in a way that shows you think he is sane?' I believe they would have answered: 'Of course I do - do you think I'm an idiot?'" [128]

This suggestion, says Wellborn, is too radical, reducing intent to a fiction. Instead, he puts forward as a possible alternative the bifurcated definition of intent set out in the Restatement of Torts, [129] in terms of which an actor intends not only those consequences which he "desires to bring about", but also those which he knows are "certain, or substantially certain, to result from his act". [130] If this is translated into hearsay terminology, an actor or declarant will be taken to have intended to assert a matter if "his act or expression was motivated, in whole or in part, by a desire to communicate a belief in the matter" or "if he had present, conscious knowledge that communication of such a belief was substantially certain to occur". [131]

No matter which interpretation is accepted, Wellborn finds little cause for optimism in this attempt to mitigate the rigidity of Rule 801. As he puts it, "[a] subjective determination of the declarant's intent is hopelessly complex if not simply hopeless, period" whereas an "objective determination does little if anything to remedy the arbitrariness and artificiality of the rule".[132]

(c.) Hearsay includes nonassertive verbal conduct:

Some writers have argued against massive odds that Rule 801 should be interpreted in such a way that the ratio decidendi in Wright v Tatham is not disturbed.[133] Chief adherent to this minority view is Professor Michael Graham, whose argument is that the Advisory Committee's interpretation is not borne out by the actual words used in the Rule. He adds: "When a statement is offered to infer state of mind of the declarant from which to infer a given fact in the form of an opinion or otherwise, since the truth of the matter directly asserted must be assumed in order for the nonasserted inference to be drawn, the statement is properly classified as hearsay under the language of Rule 801(c)."[134]

This contention, as Wellborn points out, does not always hold true: If, for instance, the statement "That driver is color blind" is tendered to establish that the traffic light was red at the time, it is not necessary to assume

the truth of the direct statement asserted. Moreover, he adds, it would be absurd to reject the Advisory Committee's interpretation of its own rule. It seems therefore that interpretation (c.) is founded more on wistful optimism than solid reality. The fact, however, that it finds support, not only among academic writers, but also in some decided cases, is indicative of the dissatisfaction felt about the soundness of Rule 801.

Turning to the case law, Wellborn finds "inconsistency, unpredictability and confusion",[135] a result that he finds hardly surprising in the light of the above analysis. The cases, he finds, fall generally into the following categories:

A. Cases adopting the narrow definition of hearsay and holding that implied assertions do not fall within the purview of the definition in Rule 801.

Illustrative of this approach is the decision in United States v Perez:[136] The appellant had been convicted of conspiring to distribute cocaine and of distributing cocaine. In an appeal, he contested the admissibility of testimony given by a government informer, one Nunez, and a special agent, one Cazares, in which they had described a telephone call taken in their presence by the appellant's accomplice, one Perez. By listening to that one side of the conversation, the two witnesses had gathered - although no express assertion was made to that effect - that

the caller was the appellant, and that the subject discussed was a transaction concerning drugs. The Court of Appeals found that the evidence had been correctly received, stating:

> "Perez' verbal conduct acknowledging that the caller was [the appellant], whether express or implied, was an implied assertion and admissible as nonassertive conduct under Federal Rule of Evidence 801(a), (c). Consequently, either Cazares or Nunez could properly testify to the call and Perez' acknowledgment over a double-hearsay objection." [137]

A similarly restrictive approach was adopted in United States v Snow,[138] where the court held that a name tag bearing the name of the appellant was non-hearsay when offered to prove that a briefcase, to which it had been affixed, belonged to the appellant. The court, however, did not even identify the problem of whether the evidence, being an implied assertion, fell within the ambit of the definition of hearsay set out in the Rules. Instead, it held the name tag to be a "mechanical trace" and thus a "type of circumstantial evidence".[139] The fallacy of this reasoning has been explained at some length above,[140] and the decision has justifiably been criticized as yielding the correct result but on erroneous theoretical grounds.[141] It may seem harsh to point a finger at the drafters of the Rules in this regard; after all, the "circumstantial evidence" label has long been a convenient escape route for courts that either have failed to identify the hearsay problem or are too familiar with the rig-

ours of the exclusionary rule. Nevertheless, Wellborn is not prepared to exonerate the drafters completely: "It may be", he adds, "that by carving the hearsay definition down to bare bones in such an unprincipled way, the Committee may have contributed to an environment in which this sort of reasoning is more likely to occur".[142]

We would do well to take heed of Wellborn's warning: By emasculating the hearsay rule through a narrowing of the definition of hearsay, the Rules have created a climate conducive to admissibility without providing for a proper assessment of trustworthiness. A preferable approach would be to label as hearsay all nonassertive conduct, whether verbal or nonverbal, and to decide the question of admissibility on grounds of reliability, either by way of a broad judicial discretion, or a statutorily-defined residual exception based on equivalent considerations. If this approach had been followed in Snow's case, no doubt the court would still have reached the same result. In the cases that follow, however, the advantages of the expansive definition will be more clearly apparent.

B. Cases applying the expansive definition and holding that implied assertions are hearsay.

(i) Cases decided after the Rules were drafted but before they became law:

United States v Pacelli,[143] a case decided in 1974 while

the Rules were still before Congress, epitomizes what Wellborn describes as "the tenacity of the sound concept of verbal hearsay discernible in modern pre-Rules cases".[144] The appellant had been convicted of the murder of a woman, Parks, and a witness, Lipsky, had been allowed to testify to the conduct and statements of the appellant's wife, uncle and friends at a gathering a few days after the murder. The purpose of this evidence, in the words of Mansfield J, was "to get before the jury the fact that various persons other than Lipsky, who had been closely associated with Pacelli, believed Pacelli to be guilty of having murdered Parks".[145] The reception of this evidence was held to be prejudicial error on the following grounds:

> "Since the extra-judicial statements clearly implied knowledge and belief on the part of third person declarants not available for cross-examination as to the source of their knowledge regarding the ultimate fact in issue, i.e., whether Pacelli killed Parks, Lipsky's testimony as to them was excludable hearsay evidence."[146]

The court considered the rationale behind the hearsay rule and the values that rule served to protect and added:

> "The admission of testimony as to the third party's declarations in the present case violated the central purpose of the hearsay rule, which is to give litigants 'an opportunity to cross-examine the persons on whom the fact finder is asked to rely.' ... Cross-examination of the declarants, had they been produced as witnesses, might have

> established that the information came from Lipsky himself, from third persons, or from news media, especially since appellant had on the same day been jailed as a result of the discovery of Parks' body." [147]

The fact that the statements and conduct "may not have been intended by those involved to communicate their belief that Pacelli murdered Parks" was dismissed by the court as "irrelevant", [148] because, on balance, it could not be said that the hearsay dangers had been materially reduced:

> "While the danger of insincerity may be reduced where implied rather than express assertions of the third parties are involved, ... there is the added danger of misinterpretation of the declarant's belief. Moreover, the declarant's opportunity and capacity for accurate perception or his sources of information remain of crucial importance. ... Here, for instance, there is no suggestion that the declarants actually observed Pacelli commit the crimes with which he was charged. ... Pacelli was entitled to cross-examine the third party declarants in order to test the validity of the inference ... that he had told the declarants he had killed Parks." [149]

The inexorable logic of this analysis, founded squarely on a basic appreciation of hearsay values, would prove difficult to eradicate. Later that same year, for instance, the court in Park v Huff [150] adopted a similar stance on the issue of implied assertions on substantially similar facts. Curiously, however, the court quoted the definition contained in Rule 801, and seemed to find no difficulty reconciling it with Professor Morgan's hearsay-danger analysis [151] upon which it based its decision. It was accordingly held that the testimony of the witness,

Seay, regarding the out-of-court statements of the declarants, Pinion and Worley, were inadmissible as they "clearly implied that Park was involved in the conspiracy to murder Solicitor General Hoard".[152] The reasoning of Judge Wisdom is worth recounting at some length:

> "Implied assertions may in certain circumstances carry less danger of insincerity or untrustworthiness than direct assertions, ... but not always. The danger of insincerity or untrustworthiness is decreased only where there is no possibility that the declarant intended to leave a particular impression. ... Here we cannot exclude that possibility; Pinion's and Worley's statements carry the implication that they mentioned the 'old man' to Seay with the intention of communicating to him, as a fact, Park's participation in the plot.
>
> When the possibility is real that an out-of-court statement which implies the existence of the ultimate fact in issue was made with assertive intent, it is essential that the statement be treated as hearsay if a direct declaration of that fact would be so treated. Baron Parke made an observation to that effect more than a century ago in the famous case of Wright v Tatham ...
>
> Were the rule otherwise, the hearsay rule could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions. The federal courts have consistently considered such implied assertions to be hearsay."[153]

A year later, in Muncie Aviation Corporation v Party Doll Fleet, Inc,[154] Judge Wisdom was called upon again to decide a similar issue. On a question of negligence following an air collision, evidence had been tendered, in the form of two advisory circulars published by the Federal Aviation Administration, to establish "the standard of care customar-

ily followed by pilots approaching uncontrolled airports".[155] Judge Wisdom quoted Rule 801(a) and observed that although the Federal Rules of Evidence were not yet in operation, the definition was in any event "merely a codification of existing law".[156] He continued:

> "Since the advisory circulars contained no assertions of fact, but merely recommended procedures, arguably they do not fall within the class of 'statements' subject to the hearsay rule. On the other hand, since the circulars were introduced to prove the F.A.A.'s belief that the procedures recommended were in fact safer than others, they could be construed as implied assertions of recommended piloting practices. Moreover, since the circulars were prepared by persons not available for cross-examination whose opinions were not subject to challenge or clarification, the recommendations suffered from the usual dangers inherent in traditional hearsay."[157]

Nevertheless, the learned judge held, the "characterization of the evidence as hearsay or non-hearsay is not dispositive of the outcome of the case".[158] He considered his decision in the Dallas County case and reiterated his view that "the primary criteria for permitting the introduction of otherwise inadmissible hearsay were the elements of necessity and trustworthiness".[159] The former requirement manifested itself in this case in the "virtual impossibility, not to mention practical inconvenience and prohibitive cost, of locating and calling as witnesses the various compilers of the advisory circulars",[160] and the latter in "the fact that they were recently published by a governmental agency whose only conceivable interest was in insuring safety".[161] The evidence had, therefore, correctly

been received by the court a quo.

This decision, according to Wellborn, served as a preamble to the "inevitable collision between rule 801 and sound common law analysis of verbal hearsay".[162] The soundness of this observation is borne out by two factors:

(1) A consideration of how the case would have been decided had the Federal Rules been effective. Clearly, as the advisory circulars constituted implied assertions, the court would have been compelled to regard them as non-hearsay, thus obviating the need to consider the question of necessity or trustworthiness. What then if the circulars had lacked these indicia of reliability?

(2) A look at case law after the adoption of the Federal Rules in July 1975. These cases, says Wellborn, reveal the deficiencies of the formulation of hearsay in Rule 801 and demonstrate dramatically "the problems that will persist unless the rule is rewritten".[163]

(ii) Cases decided after the Rules became law:

In Park v Huff,[164] Judge Wisdom had warned against the restrictive definition of hearsay, predicting that it could lead to the rule being "circumvented through clever questioning and coaching of witnesses, so that answers [are] framed as implied rather than as direct assertions".[165] In United States v Check,[166] this prophecy

came dangerously close to being fulfilled. Check, a police officer, had been convicted of possession and distribution of heroin as well as conspiring to distribute narcotic drugs. Chief witness for the prosecution was an undercover detective, one Spinelli, who had investigated the case and had employed the assistance of an informer, Cali, to introduce him to Check as a prospective purchaser of the drug. The preliminary negotiations were conducted between Check and Cali, who then passed on the information to Spinelli. Cali, however, had refused to testify at Check's trial, a problem which the prosecutor in the court a quo overcame by employing a method of questioning which, it was argued, circumvented the obstacles presented by the hearsay rule. He did this by establishing from Spinelli that he and Cali had conversed on several occasions, and then by asking Spinelli at least thirteen times: "Without telling us what Mr Cali said to you, what did you say to him?"[167] At this invitation, Spinelli responded with, inter alia, the following accounts:

> "At that time I told William Cali I didn't particularly care whether or not Check was concerned about rats and not wanting to meet anyone new or about being busted by the man, and I had again still no intention of fronting any money or the $300 which Cali owed him."[168]
>
> .....
>
> "I told William Cali at the time I didn't particularly care whether or not the cocaine which I was supposed to get was 70 percent pure, nor

> the fact that it was supposed to come from a captain of detectives; I had again no intention of fronting any money to him, the $1 200 for the ounce of cocaine or the $300 which William Cali owed to him." [169]
>
> .....
>
> "I had a conversation with William Cali and at the time I informed him that I was glad to find out that Check, after seeing me in the street, had felt somewhat more comfortable now, that he was going to make arrangements now to get the ounce of cocaine that I wanted, and that I was willing to wait with him to call Check at a quarter after 1:00, and then subsequently proceeded to pick up that ounce of cocaine." [170]

This evidence was admitted in the court a quo, albeit somewhat reluctantly, the trial judge remarking that Spinelli "doesn't seem to be [testifying to just his part of the conversation .]. He seems to be weaving the two together. We can't distinguish which is which." [171]

The court of appeals, however, was unequivocal in its condemnation of the evidence, holding that it "was a transparent attempt to incorporate into the officer's testimony information supplied by the informant who did not testify at trial. Such a device", the court continued, "is improper and cannot miraculously transform inadmissible hearsay into admissible evidence". [172] It rejected out of hand the argument advanced by the prosecution that the evidence was non-hearsay because it "was not offered for the truth of the matters asserted therein but was offered instead for more limited, and allegedly per-

missible, purposes".[173] In the view of Waterman J, this line of reasoning constituted a "subterfuge"[174] and an "audacious ... artifice",[175] the effects of which would be most prejudicial to Check:

> "[B]y incorporating Cali's hearsay into Spinelli's testimony, the government received the benefit of having, in effect, an additional witness against Check while simultaneously insulating from cross-examination that witness, a witness whom we can safely assume would have been subjected to a scathing, and perhaps effective, cross-examination by defense counsel."[176]

Of some interest is the absence of any reference by the court to the definition of hearsay in Rule 801. The court did perhaps allude to this problem by stating that Cali's out-of-court statements were "no doubt ... being offered to prove the truth of the matters asserted in them".[177] There can be no doubt as to the correctness, in principle, of the court's decision. Of greater concern, however, is the question whether this principle can be made to square with the wording of Rule 801. This is somewhat doubtful in the light of the narrow interpretation that most commentators concede would seem to be required by the drafters of that rule, and, moreover, in view of cases such as Perez and Snow. Obviously, the courts will not allow evidence as damaging as that tendered in Check to be admitted, despite anything contained in the Federal Rules, but it would seem that their efforts to evade its constricted ambit will engender unnecessary difficulty and confusion.

These fears are borne out further by the decision in United States v Ariza-Ibarra,[178] another drug case, where the state sought to prove indirectly the statements of an informer, Larain, who did not testify, through the testimony of an agent, Jorge. By so doing, "[i]t was ... conveyed to the jury, implicitly but unmistakably, that Larain knew first-hand that Ariza was a drug dealer - and that Larain himself was exceptionally reliable in such matters".[179] The court of appeals, again, was not prepared to sanction this, stating that "the jury may not give any credit whatever to the implied testimony, much less the views concerning guilt, of an absent witness".[180] (Italics added.) The evidence was, therefore, excluded as being hearsay. What causes Wellborn some concern, however, is the fact that the court cited,[181] as authority for this proposition, both Rule 801 and the case of Wright v Tatham, without realizing the inconsistency involved. It would seem, therefore, as Weinberg once remarked, "as though we have not taken what Baron Parke said seriously enough".[182]

(B) AUSTRALIA

Although the reform of the hearsay rule on a federal level is at present in its infancy, state law commissions in Australia have long been active.[183] In Tasmania, South Australia, Queensland and New South Wales, the hearsay

problem has, in varying degrees, come under the microscope and formed the subject of substantial reports and recommendations, which, in some cases, have led to legislation. I do not propose to deal with all these reports, but one which I submit may be of interest is the report of the New South Wales Law Reform Commission, published in 1978.[184]

This proposal advocates the abolition of the hearsay rule in its present form, and seeks to substitute it with detailed rules relating to the admissibility of "out of court statements". These are defined to include both statements and conduct, but only if they are intended as assertions, thus excluding implied assertions. Such statements are treated as being admissible provided either the maker of the statement is called as a witness, or the party tendering the statement is justified in not calling him to testify and the stipulated procedural requirements are followed. Grounds of justification are then specifically enumerated, being wider in civil than in criminal proceedings. It is further provided that, in deciding whether any of these grounds is satisfied, the court shall have regard to the nature and importance of both the statement and the question on which the statement is tendered, the resources available to the parties, and, in criminal cases, the standard of proof to be met and <u>any</u> other relevant matters.

A distinction is drawn between an oral statement, which is admissible only if the declarant had knowledge based upon his own observations and if the person testifying actually heard it, and documentary evidence, which, if it came into being in a reliable way, is admissible no matter how many links there are in the chain of copies. These provisions are supplemented, however, by a series of far-reaching discretionary measures. The court is given a general discretion to admit hearsay evidence where the statement is not otherwise admissible if there are reasonable grounds for thinking that it may be reliable. In criminal proceedings, the discretion is extended to allow the reception of an otherwise inadmissible statement which supports the acquittal of the accused.

There are also discretionary measures to allow the court to exclude evidence otherwise admissible in terms of these proposals, where, inter alia, its weight is too slight; its utility is outweighed by its tendency to prolong the proceedings; it would operate unfairly against the adversary or mislead the jury; its admission would constitute an abuse of process; or the other party would be unfairly surprised.

These recommendations have not yet been implemented, however, and have not met with unequivocal acclaim. The Australian Law Reform Commission has criticized the choice of definition on the ground that, although it is designed

"to resolve doubts about whether evidence of 'implied assertions' is hearsay", it creates "difficult questions ... about whether assertions that can be inferred from a statement or conduct were in fact intended by the person who made the statement or did the relevant act".[185] The Commission also expressed reservations about the discretionary measures, arguing that they create uncertainty (which is not alleviated by a notice procedure or by pre-trial decision) and would be difficult for the court to apply. In an article in the Australian Law Journal, similar sentiments were expressed:

> "One has some reservations about the allowance of such a discretion, unless its scope and nature are carefully defined. Is it to be a 'free' discretion, or a discretion requiring to be 'properly exercised'? The judgments of individual judges of the High Court during recent years are sprinkled with dicta as to what considerations may legitimately be taken into account or ougnt mandatorily to be given particular weight or mandatorily to be disregarded in the 'proper' exercise of a statutory discretion. Appeals to the High Court against the exercise of a too loosely defined discretion to admit hearsay could easily lead, not only as contemplated, to the development of useful precedents as to the admission of reliable classes of hearsay testimony, but also to a maze of controlling rules, and exceptions thereto, no less daunting than the present maze of exceptions to the hearsay rule." [186]

The rejection of both the restrictive definition of hearsay and the discretionary approach to resolving the problem of admissibility constitute, therefore, the two most striking features of the proposals of the Australian

Law Reform Commission.[187] Given the formidable task of reviewing Australian evidentiary law and recommending appropriate legislation to effect both uniformity and reform, the Commission has turned its attention to the vagaries of the hearsay rule, examining the reasons traditionally offered for its justification, its merits, its shortcomings, and its treatment at the hands of codifiers in the major Anglo-American jurisdictions. Flowing from this carefully-compiled analysis is a proposal for the reform of the rule, the salient characteristics of which are as follows:

(1) General Approach:

The Commission follows the common law approach of a general exclusionary rule qualified by stipulated exceptions. The term "hearsay", however, is avoided, and instead the expression "previous representation" is used. Clause 2 states the general exclusionary rule:

> "Subject to this Act, a party to a trial may not tender evidence of a previous representation to prove the facts asserted by the representation."

(2) Definitions:

A "previous representation" is defined as "a representation made by a person otherwise than in the course of giving evidence in the trial in which the evidence of the representation is sought to be given", while "representation" is defined as "an assertion of a fact, whether the

assertion is oral, written, express, implied or to be inferred from conduct, and whether or not the person who made the representation intended it to be an assertion of that fact".[188]

The decision to include implied assertions within its definition is justified by the Commission on the following grounds:

> "By including conduct and implied representations in the definition the debate is avoided about whether [such] evidence ... is hearsay ... The difficult questions posed by defining hearsay as implied assertions 'intended' to be assertive are also avoided."[189]

(3) First-hand hearsay:

The Commission distinguishes between what it calls "first-hand" and "second-hand" hearsay. The former it defines as a previous representation, "made by a person whose knowledge of the fact asserted by it was or might reasonably be supposed to have been based on his own observations of that fact", the maker of which was, at the time he made it, "mentally capable of giving evidence of the fact asserted by it".[190] The admissibility of such representations is governed by specified principles, the stringency of which is dependant on whether the proceedings are criminal or civil and whether the maker of the representation is available to testify.

(a) Civil proceedings:

(i) Where the maker is unavailable, the representation is admissible, provided "the person giving the evidence witnessed the making of the previous representation" and notice is given in terms of the Bill.[191]

(ii) Where the maker is available, the conditions of admissibility are more strict. The representation must be "made at a time when the facts referred to in it were or could reasonably be supposed to have been fresh in the mind of the person making it"; the maker must be called to testify unless there is no objection or the court grants leave; other witnesses giving evidence of the representation must have witnessed its making; and notice - except in certain exceptional cases - must be given in terms of the Bill.

(b) Criminal proceedings:

(i) Where the maker is unavailable:

Apart from the prerequisites stipulated in (a)(i) above for civil cases, a previous representation tendered by the prosecution must, in addition, comply with one of the following conditions:[192] It must have been made either at a time when the facts referred to in it were or could reasonably be supposed to have been fresh in the mind of its maker; or by a person acting under

a duty to make it; or during and relating to the employment of its maker; or under oath, in any court of law, in proceedings between the parties to the trial, provided the maker was cross-examined at those proceedings and a reliable record of the cross-examination is tendered in evidence; or against the financial interests or reputation of its maker; or in circumstances tending to establish that its maker has committed an offence or is liable in damages at the suit of another person. This clause was designed to incorporate some of the common law exceptions, which have been modified to meet the major criticisms traditionally levelled at them, viz. that they operate uncertainly and tend often to result in the exclusion of probative evidence.

Even if these conditions are satisfied, the court is expressly directed to exclude a representation where the accused proves that its maker had a motive to misrepresent the facts asserted by it.[193]

A previous representation tendered by the accused, on the other hand, is not subject to these conditions, and is admissible provided the person who testifies actually witnessed its making, and the prescribed notice procedure is followed.[194]

(ii) Where the maker is available:

The conditions of admissibility here are the same for the

prosecution and the accused: The previous representation must have been made at a time when its contents were fresh in the mind of its maker; its maker must be called to testify; other witnesses giving evidence must have witnessed its making; and the required notice must have been given.[195]

(4) Second-hand hearsay:

Such evidence, the Commission opined, where a representation of fact is made by a person who does not have personal knowledge of its contents, is "generally so unreliable that a more restricted and specific approach must be taken to its admissibility".[196] Accordingly, it adopts an approach of identifying specific areas where there is a need to admit second-hand hearsay, and formulating "sufficient safeguards of reliability to ensure that the court's time is not wasted" and that the adversary is adequately protected. These areas, in the Commission's view, were as follows:

(a) Public and private records: These are rendered admissible to prove the facts referred to in them, no matter what form they may take.

(b) Reputation: Specifically reputation as to family history and relationships, public and general rights, and marriage.

(c) Telegraphic messages: These are made admissible as evidence of their contents and the person by whom they are sent.

(5) Protection of the adversary:

The Commission expressed the view that "[i]t is desirable that the party against whom hearsay evidence is to be led should not be taken by surprise".[197] It accordingly recommended that such party be served, not less than fourteen days before the date fixed for trial, with a notice containing (inter alia): the date, time and place at which the previous representation was made; the names and addresses of the maker of the representation; complete details of the evidence proposed to be tendered; complete details of the facts sustaining the admissibility of the representation in terms of the proposed Bill; complete details of all other relevant representations of the maker; and, where the maker of the representation is available, and the evidence is tendered in civil proceedings in terms of s 5, a statement as to whether the maker will be called to testify, and, if not, the grounds relied on for not calling him.[198]

Provision is made for objection to the service of notice in civil trials,[199] and the courts are given a residual discretion to "permit evidence of a previous representation to be tendered notwithstanding that notice, as re-

quired ... has not been given".[200]

Comment on Some Aspects of these Proposals

(1.) Choice of definition

The Commission's decision to adopt a broad definition of hearsay is to be welcomed. If adopted, this definition will be the only one of its kind in the Anglo-American evidentiary world, most codes having adopted a version similar to that in the Federal Rules. The merits of the expansive formulation have been stressed at length throughout this dissertation, and the definition proposed by the Commission escapes the criticism levelled at the American formulation by writers such as Finman[201] and Wellborn.[202] In the context of the proposals advanced by the Commission, this definition fulfils two significant functions: First, it subjects implied assertions to the identical conditions of admissibility as express assertions; if a doctor's express statement that "X has a spinal injury" is to be excluded as not satisfying these conditions, then his conduct in treating X for a spinal injury must similarly be rejected. Secondly, where the conditions of admissibility have been satisfied, the fact that an implied assertion has been labelled hearsay as opposed to "original" or "circumstantial" will serve to warn the court not to attach too much weight to the evidence. In this regard, the traditional hearsay dangers

may properly be taken into account, even though they were considered insufficiently strong to warrant exclusion.

(2.) General approach

Both the Federal Rules and the proposals of the Australian Law Commission advocate a broad exclusionary principle qualified by exceptions. Here, however, the similarity ends. The Federal Rules contain twenty-seven rigidly formulated exceptions, which to a large extent embody the common law, lubricated by a residual discretion to admit hearsay that falls within certain limits. The Australian proposal, on the other hand, contains neither a list of ad hoc exceptions nor a residual discretion. Instead, it reflects a concerted attempt to isolate general principles for admitting hearsay, based on the rationale of the common law exceptions and the values underlying the hearsay rule. The essential variables in this mix are reliability, necessity and fairness, and these are reflected in the three major distinctions drawn by the Commission in its treatment of hearsay:

(i) First- and second-hand hearsay: The more restricted, specific approach accorded the latter category is explained on the basis of its general unreliability.

(ii) Civil and criminal proceedings: In the view of the Commission "considerations of fairness" required that a different approach be taken to hearsay evidence

in criminal trials as opposed to civil trials, as:

> "[t]raditionally, the criminal trial is premised on the view that we should minimise the risk of convicting the innocent, even though this may result in the acquittal from time to time of the guilty. The proceedings are of a very serious nature involving allegations of breach of the law and involving serious consequences for an accused person found guilty." [203]

(iii) Availability and unavailability of the maker of the statement: Where the declarant is unavailable to testify, the need for receiving hearsay is obviously much greater. The principle of necessity has, as the Commission points out,[204] been employed in all legislation attempting to reform the hearsay rule.

Apart from these three primary criteria, the Commission also took into account the following secondary considerations: Expedition in the proceedings, finality, the need to avoid unnecessary expense, certainty, clarity and simplicity. The result is a code which avoids the statutory catalogue of time-honoured exceptions favoured by the Federal Rules, and which is fashioned more by sound legal policy than the haphazard erosion of the hearsay monolith at the hands of the courts. In <u>this</u> respect, the Australian approach is, it is submitted, preferable. After all, the common law exceptions have been the subject of too many barbs and assaults to warrant legal immortality; of far greater value is the general policy, or highest

common factor, that may be elicited from these exceptions. This gives the system a greater degree of cohesion, and allows it to deal more flexibly with the vicissitudes of practice. In another respect, however, the Australian approach is, it is submitted, deficient. Unlike the Federal Rules, the Commission's proposed code makes no provision for a residual discretion either to admit otherwise inadmissible hearsay, or to exclude otherwise admissible hearsay.

It could, perhaps, be argued that there is no need for such measures in view of the liberal "general principle" approach adopted by the Commission. This argument, however, ignores three important considerations:

(i.) Although the Commission eschewed the "specific exception" approach of the Federal Rules in favour of general principles of exclusion, some areas of the proposed code are more conservative in their treatment of hearsay than others. One thinks particularly of evidence tendered by the prosecution in criminal trials, where the Commission, by its own admission, attempted to incorporate a revised version of the common law exceptions relating to declarations of deceased persons. The entire class of second-hand hearsay, moreover, is dealt with along the lines of the specific exception approach of the Federal Rules. The result is that, although the Commission's treatment of hearsay may

generally be said to be more flexible than that of its American counterpart, in certain specific areas, the opposite may be true. By adopting a residual discretionary exception, the drafters of the Federal Rules recognized that no list of specific exceptions could cope adequately with the vagaries of hearsay. The Australian proposal, it is submitted, could be improved by recognizing that same fact.

(ii) By defining hearsay to include nonassertive verbal and nonverbal conduct, the proposed code brings under the hearsay banner a vast welter of evidence, the status of which was previously uncertain, and in respect of which the hearsay problem was usually ignored. The common law exceptions, including those retained in the proposal, arose almost exclusively in response to the need to receive certain express assertions, and may not be appropriate to implied assertions. The trustworthiness of such assertions is often enhanced by their nonassertive quality, thus lending force to the argument that they be subjected to less rigorous demands than express assertions. The Australian proposal, however, ignores this distinction, and treats express and implied assertions in the same way. The flaws in this approach may be demonstrated by taking the following example, derived from the facts of S v Van Niekerk:[205]

A magistrate, A, is charged with the theft of a valuable rifle that he has confiscated from B. His defence is that B had told him to sell the rifle and keep the proceeds. To rebut this defence, the prosecutor tenders evidence of letters written by B to his brother, in which he requested him to collect the rifle from A. These letters were written after the date on which A was allegedly instructed to keep the money, and at a time when the issuing of such instructions, if they were indeed given, was no longer "fresh in his mind". This evidence would, in terms of the Commission's proposals for criminal trials in clause 6, be inadmissible, as none of the exceptions listed in clause 6(1)(b) is applicable. Nevertheless, a strong argument may be made for admissibility, as the reliability of the evidence is suggested by two factors:

a. the lack of assertive intent, which reduces the danger of insincerity; and

b. the fact that the subject matter of the assertion was of importance to A, which reduces the possibility of honest error.

The point that emerges from this example is that it is difficult, if not impossible, to lay down a closed list of reliability factors on which to precipitate the admissibility of implied assertions. Such factors are

best gleaned from all the circumstantial factors that may exist in a particular case. This exercise defies precise enumeration and lends itself instead to the more flexible attributes of a judicial discretion.

(iii) While the rather liberal approach of the Australian Commission may, in some areas, reduce the need for a discretion to admit, it has the opposite effect in respect of a discretion to exclude evidence. The proposed code opens the floodgates to a torrent of hearsay assertions, many of which may carry minimal probative force. Even the more conservative Federal Rules contain a provision[206] empowering the court to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The need for a similar discretion in the Australian proposal would seem to be even greater if the courts are not to be faced with a stream of time-consuming, prejudicial evidence of negligible value.

(3.) The possibility of a judicial discretion

In response to criticism of its hearsay proposal, the Commission in 1982 issued a further research paper, entitled "Hearsay Law Reform - Which Approach",[207] in which it examined, respectively, the merits of a system that minimizes and maximizes the scope of a judicial

discretion to exclude hearsay. Its analysis may be summarized as follows:

A. Minimizing judicial discretion

(a) Model epitomizing this approach:

To demonstrate this perspective of hearsay, the Commission uses its own previous proposal for reform of the rule, which, although it contains some discretionary elements, is largely principle-oriented.

(b) Advantages of this approach:

(1) Historical consistency: It is consistent with the development of the rule at common law, and is therefore not entirely alien to legal practitioners and judicial officers.

(2) Certainty and predictability: It allows parties to ascertain, with reasonable certainty, in advance, whether particular items of evidence will be received.

(3) Consistency: It is preferable, especially in criminal trials, that the rights of the parties be determined by pre-existing rules rather than the capricious whim that characterizes a discretion.

(4) Economy and efficiency: Specific rules have the effect of confining debate and thus reducing litigation time and cost.

(5) Impetus to reform: The greater the discretion given to the court to control the admissibility of hearsay, the more likely it will be that the common law will continue to flourish in its existing form.

(6) Focus on principle and policy: By drawing up precise rules, the legislature is compelled to confront and attach priorities to the vital issues.

(c) Disadvantages of this approach:

(1) Exclusion of probative evidence: By allowing hearsay to be received only within the limits of specific exceptions, it is inevitable that some valuable evidence will be lost to the court. In the Australian proposal, this is particularly apparent in the case of second-hand hearsay and evidence led by the prosecution in criminal trials, where the exceptions are more restrictively framed. The Commission conceded in its second paper that this may necessitate adding a discretion to admit probative evidence in order to moderate these provisions.

(2) Complexity: Any system of exact categories must necessarily be more complex than a discretionary approach. This may hinder acceptance of this approach and reduce its appeal in the eyes of practitioners.

(3) Cost: By rendering some probative and valuable hearsay inadmissible, the proposed code necessitates the calling of witnesses in situations where cost savings could

be achieved by relying on the hearsay evidence.

(4) Notice requirements: These, the Commission concedes, may be criticized as being unrealistic and impractical. In the United States, such requirements are often ignored, despite being a precondition to admissibility by way of the residual exceptions (viz. Rules 803(5) and 804(24)). Perhaps, it continues, this procedure should only be required where either the maker of the statement is alleged to be unavailable or where a party wishes to avoid calling the maker for cost reasons.

B. Maximizing judicial discretion

(a) Suggested model:

As an example of this approach, the Commission proposes a general principle of exclusion, qualified by, instead of specific exceptions, a general discretion to admit hearsay subject to the following four requirements being satisfied:[208]

(1) Reliability: Whether the evidence is sufficiently trustworthy.

(2) Convenience: Whether it is more probative on the point in issue than any other evidence that could reasonably be procured.

(3) Justice: Whether, on balance, it would be fair and in the interests of justice to receive the evidence.

(4) Public policy: Whether countervailing policy considerations require its exclusion.

The Commission then elaborates on these conditions, stating what factors may be considered in this enquiry. It is submitted, however, that these factors are not sufficiently comprehensive to be of any real value. If it is necessary to give guidance on the exercise of a general discretion, then such guidance should be clear and explicit instead of confusing and abstruse.

(b) Advantages:

(1) This approach avoids the detailed categorization of the proposed code, and offers simplicity, flexibility and uniformity. The basic hearsay values of reliability, convenience and justice are elevated to preconditions of admissibility instead of being the motifs of a system of proliferating exceptions.

(2) It may easily be grasped by legal practitioners and judicial officers.

(3) It reflects the approach taken in many Continental countries, where the hearsay rule is unknown and the judge has complete control over the evidence tendered.

(c) Disadvantages:

(1) Judges would, in the absence of adequate indications to the contrary, exercise their discretion conservatively so as to retain the status quo.

(2) Broad concepts such as reliability, justice and

convenience are likely to engender a lack of uniformity. Any attempt to remedy this problem, however, would restrict its simplicity and flexibility.

(3) A broad discretion would probably render decisions uncertain and unpredictable. Parties would thus have to keep witnesses available to testify in the event of certain hearsay being rejected. Legal advice on evidence would become hazardous and pre-trial settlements inhibited. All this would increase litigation and costs.

(4) The floodgates would be opened to swamp the courts with evidence of marginal relevance. As mentioned above, however, this objection would disappear if the courts were allowed a general discretion to exclude, similar to that provided by Rule 403 of the Federal Rules.

(5) A litigant could object to the admissibility of any hearsay, necessitating deliberation by the court of all the factors and guidelines mentioned above. This would increase the potential for delays, which could be exploited by more wealthy litigants to protract trials.

(6) All hearsay would stand the risk of exclusion, including evidence presently admissible in terms of the exceptions to the rule. This would further increase uncertainty and reduce uniformity.

(7) A broad discretionary approach would increase the points of objection which may be taken on appeal, increas-

ing both the number and length of appeals.

(8) Reliability would become a threshold issue, in that the courts would have to determine whether evidence is reliable even before it is admitted. This may often prove to be difficult, as a proper assessment of reliability may not be possible until all the evidence has been led. Judicial officers would thus be forced to admit a substantial amount of questionable evidence "subject to objection".

Conclusion:

The need for legislative reform of the hearsay rule has long been recognized. As early as 1898, Thayer suggested it would be beneficial to "restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible".[209] Almost half a century later, Professors Morgan and Maguire found no reason to revise Thayer's appraisal of what they termed a "peculiarly absurd portion of the law of evidence".[210] In the words of the learned writers: "Fifty years have done comparatively little to make it sensible, and fifty further years of judicial evolution will do little more. Legislation is imperative ..."[211] Today, another half a century later, these words seem, from a South African point of view, prophetic.

In 1938, in an article entitled "Tomorrow's Law of Evi-

dence",[212] Mc Cormick predicted a "drift ... from rules of exclusion mandatory on the judge, to rules expressed in terms of discretionary balancing of considerations",[213] concluding that "the time will soon be ripe for us to recognize that the [hearsay rule] calls for a treatment in terms of a discretion which needs only to be limited by some requirement of fair notice and to be guided by a general standard".[214] In view of the arguments submitted in this and the following chapter, it is my hope that these words will, in the same way as those of Morgan and Maguire, be prophetic.

NOTES TO CHAPTER IX

1 A good summary of reform action in these countries may be found in a research paper of the Australian Law Reform Commission (Cth), viz ALRC, RP 3 Hearsay Evidence Proposal (1981) at 76-115.

2 Id at 122-3. See also clause 1(1) of the hearsay proposal at p 134 of the report.

3 Id at 173.

4 ALRC, RP 9 Hearsay Law Reform - Which Approach? (1982).

5 R Graham Murray "Evidence: A Fresh Approach. The American Uniform Rules of Evidence (1953)" (1959) 37 Canadian Bar Review 576 at 582.

6 American Law Institute Model Code of Evidence (1942).

7 John MacArthur Maguire Evidence - Common Sense and Common Law (1947) at 153.

8 Jack B Weinstein "Alternatives to the Present Hearsay Rules" 44 Federal Rules Decisions 375 at 378.

9 See, for instance, Ted Finman "Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence" (1962) 14 Stanford LR 682.

10 Unif. R. Evid. 63(4)(c).

11 These being Kansas, New Jersey, California, the Virgin Islands and Utah.

12 See J Weinstein and M Berger Weinstein's Evidence (1975) at T - 1 (Supp 1981).

13 Olin Guy Wellborn III "The Definition of Hearsay in the Federal Rules of Evidence" (1982) 61 Texas LR 49 at 49.

14 Id at 50.

15 C Wright and K Graham Federal Practice and Procedure (1977) para 5005 at 92.

16 Fed. R. Evid. 801 Advisory Committee Note. All ensuing quotes from the Committee's report are taken from the same reference, which will not be repeated.

17 Particularly Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331.

18 Quoting James H Chadbourn "Bentham and the Hearsay Rule - A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence" (1962) 75 Harvard LR 932 at 947.

19 Weinstein "Alternatives ... ", op cit note 8, at 380.

20 Ibid.

21 See Josiah H Blackmore II "Some Things About Hearsay: Article VIII" (1977) 6 Capital University LR 597 at 624.

22 Supreme Court Rule 36(9); Magistrate's Court Rule 24(9).

23 See L H Hoffmann and D T Zeffertt South African Law of Evidence 3ed (1981) 84 and cases cited at 84 note 8.

24 Fed. R. Evid. 803(24) and 804(b)(5).

25 For a full account see, for instance, Edward J Imwinkelried "The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence" (1978) 15 San Diego LR 239 at 247-252, and Kenneth W Barton and Richard G Cowart "The Enigma of Hearsay" (1978) 49 Mississippi LJ 31 at 121-7.

26 Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (1969) 46 Federal Rules Decisions 161.

27 See H.R. Rep. No. 650, 93d Cong., 1st Sess. 5-6 (1973).

28 See S. Rep. No. 1277, 93d Cong., 2d Sess. 18-20 (1974).

29 286 F. 2d 388 (1961).

30 S. Rep. No. 1277, 93d Cong., 2d Sess. 20 (1974).

31 Id at 19.

32 Fed. R. Evid. 801 Advisory Committee Note.

33 See in this regard Imwinkelried, op cit note 25; Hochman "The Residual Exceptions to the Hearsay Rule and the Federal Rules of Evidence: A Critical Examination" (1978) 31 Rutgers LR 543; and David A Sonenshein "The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule" (1982) 57 New York University LR 867.

34 Imwinkelried, op cit note 25, at 264.

35 Id at 243.

36 Wigmore Evidence V 3ed (1940) para 1420.

37 See Imwinkelried, op cit note 25, at 244-5.

38 United States v Kearney 420 F. 2d 170 (1969) at 174-5; see also United States v Brown 411 F. 2d 1134 (1969) and Sabatino v Curtiss National Bank of Miami 415 F. 2d 632 (1969).

39 284 F. Supp. 409 (1968).

40 At 411.

41 At 413.

42 At 412.

43 Ibid.

44 At 412-3.

45 286 F. 2d 388 (1961). This case is discussed in full at 344 ante.

46 Imwinkelried, op cit note 25, at 246.

47 349 F. 2d 264 (1965) at 276. See also Butler v South Pacific Co 431 F. 2d 77 (1970) and United States v Schwartz 252 F. Supp. 866 (1966).

48 445 F. 2d 967 (1971).

49 At 972 note 6.

50 Supra note 30.

51 Imwinkelried, op cit note 25, at 252.

52 See, for example, United States v Gomez 529 F. 2d 412 (1976), Ark-Mo Farms, Inc v United States 530 F. 2d 1384 (1976) and Muncie Aviation Corp v Party Doll Fleet, Inc 519 F. 2d 1178 (1975), where reference is made to the Dallas County case; and United States v Carlson 547 F. 2d 1346 (1976), where reference is made to Chestnut v Ford Motor Company.

53 Imwinkelried, op cit note 25, at 253. See also the cases he cites at 253-5.

54 See, for example, Ark-Mo Farms, Inc v United States, supra note 52; United States v Pfeiffer 539 F. 2d 668 (1976); and United States v Iaconetti 406 F. Supp. 554 (1976).

55 401 F. Supp. 604 (1975).

56 At 608.

57 Ibid.

58 557 F. 2d 309 (1977).

59 At 315.

60 Ibid.

61 At 316.

62 At 320-1.

63 At 321.

64 At 320. See also United States v Mathis 559 F. 2d 294 (1977) at 299.

65 427 F. Supp. 859 (1977).

66 At 866.

67 Ibid.

68 Imwinkelried, op cit note 25, at 258.

69 Ibid.

70 Ibid.

71 S. Rep. No. 1277, 93d Cong., 2d Sess. 20 (1974).

72 Id at 19.

73 Id at 20.

74 David A Sonenshein "The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule" (1982) 57 New York University LR 867 at 905.

75 Id at 876.

76 For illustrative cases, see Sonenshein, op cit note 74, at 876 note 55.

77 For illustrative cases, see Sonenshein, op cit note 74, at 877 note 56.

78 For illustrative cases, see Sonenshein, op cit note 74, at 877-8, note 56.

79 See the cases discussed by Sonenshein at 880-3.

80 Sonenshein, op cit note 74, at 879.

81 Id at 885.

82 See, for example, United States v Leslie 542 F. 2d 285 (1976), United States v McPartlin 595 F. 2d 1321 (1979) and United States v American Tel & Tel. Co 516 F. Supp. 1237 (1981).

83 See, for example, United States v Love 592 F. 2d 1022 (1979), United States v Kim 595 F. 2d 755 (1979) and Zenith Radio Corp v Matsushita Electric Industrial Co 505 F. Supp. 1190 (1980).

84 Sonenshein, op cit note 74, at 875.

85 See Chapter X post.

86 Fed. R. Evid. 801 Advisory Committee Note. All ensuing quotes from the Committee's report are taken from the same reference, which will not be repeated.

87 Olin Guy Wellborn III "The Definition of Hearsay in the Federal Rules of Evidence" (1982) 61 Texas LR 49 at 52.

88 Kenneth W Barton and Richard G Cowart "The Enigma of Hearsay" (1978) 49 Mississippi LJ 31.

89 Id at 35. See also R O Lempert and S A Saltzburg A Modern Approach to Evidence (1977) at 348-51. At 351, the authors submit that the drafters of the Federal Rules followed "the wiser course in not treating assertions implied from conduct as hearsay".

90 The learned writers cite State v Izzo 383 P. 2d 116 (1963) as being illustrative of this approach.

91 Susan R Kelly "Hearsay Evidence and the Federal Rules: Article VIII - I. Mapping out the Borders of Hearsay" (1975) 36 Louisiana LR 139.

92 Id at 147.

93 Fed. R. Evid. 403.

94 Kelly, op cit note 91, at 145.

95 Ibid.

96 Apart from the commentators mentioned below in the text, see also Walker Jameson Blakey "You Can Say That If You Want - The Redefinition of Hearsay in Rule 801 of the Proposed Federal Rules of Evidence" (1974) 35 Ohio St LJ 601.

97 Josiah H Blackmore II "Some Things About Hearsay: Article VIII" (1977) 6 Capital University LR 597.

98 Id at 598.

99 Id at 599.

100 I Daniel Stewart Jr "Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence" (1970) Utah LR 1.

101 Id at 37.

102 Ibid.

103 Ibid.

104 Ibid.

105 Id at 38.

106 Wellborn, op cit note 87, at 52.

107 Id at 55.

108 (1837) 7 Ad & El 313, 112 ER 488. This case was discussed at length in Chapter V ante.

109 Wellborn, op cit note 87, at 58.

110 Ibid.

111 Ibid.

112 Finman, op cit note 9, at 692, cited by Wellborn, op cit, at 61.

113 Wellborn, op cit note 87, at 63.

114 See Judson F Falknor "The 'Hear-Say' Rule as a 'See-Do' Rule: Evidence of Conduct" (1961) 33 Rocky Mountain LR 133 at 137.

115 Wellborn, op cit note 87, at 63-4.

116 Id at 64.

117 Id at 67.

118 Ibid.

119 See Finman, op cit note 9, at 700; Wellborn, op cit note 87, at 67-8.

120 Wellborn, op cit note 87, at 68.

121 Webster's Third New International Dictionary (P Gove ed 1971) 131.

122 See, for example, C T Mc Cormick Handbook of the Law of Evidence 2ed (1972) 599-600; Vaughn C Ball "The Changing Shape of the Hearsay Rule" (1977) 38 Alabama LR 502 at 506; Blakey, op cit note 96, at 611; Finman, op cit note 9, at 684; Stewart, op cit note 100, at 38; and Comment "State of Mind: The Elusive Exception" (1976) 9 U.C.D. LR 199 at 203-4.

123 Fed. R. Evid. 801 Advisory Committee Note.

124 Wellborn, op cit note 87, at 78.

125 Id at 75, derived from an example put forward by Eustace Seligman "An Exception to the Hearsay Rule" (1912) 26 Harvard LR 146 at 150-1.

126 Id at 76.

127 Ball, op cit note 122, at 506.

128 Id at 507.

129 Restatement (Second) of Torts (1965) para 8A.

130 Ibid.

131 Wellborn, op cit note 87, at 78.

132 Id at 81.

133 See, for example, M Graham Handbook of Federal Evidence (1981) paras 801.7 and 801.10, and B Jefferson California Evidence Benchbook (1972) para 1.4.

134 M Graham, op cit note 133, para 801.7 at 701.

135 Wellborn, op cit note 87, at 83.

136 658 F. 2d 654 (1981).

137 At 659.

138 517 F. 2d 441 (1975).

139 At 443.

140 See 296-7 ante.

141 See M Graham, op cit note 133, para 801.6 at 693.

142 Wellborn, op cit note 87, at 85.

143 491 F. 2d 1108 (1974).

144 Wellborn, op cit note 87, at 85.

145 At 1115.

146 At 1116.

147 Ibid.

148 Ibid.

149 At 1117.

150 493 F. 2d 923 (1974).

151 The court, at 927, cited with approval the following passage written by Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harvard LR 177 at 218:

> "[S]hould we not recognize that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted', but rather the presence of substantial risks of insincerity and faulty narration, memory and perception?"

152 At 927.

153 At 927-8.

154 519 F. 2d 1178 (1975).

155 At 1180.

156 At 1181.

157 At 1182.

158 Ibid.

159 Ibid.

160 Ibid.

161 Ibid.

162 Wellborn, op cit note 87, at 87.

163 Id at 88.

164 493 F. 2d 923 (1974).

165 At 928.

166 582 F. 2d 668 (1978).

167 At 671.

168 Ibid.

169 Ibid.

170 Ibid.

171 As cited by the Court of Appeals at 679.

172 At 679.

173 At 681.

174 At 680.

175 At 679.

176 At 683.

177 At 679.

178 605 F. 2d 1216 (1979).

179 At 1222.

180 Ibid.

181 Ibid.

182 Mark Weinberg "Implied Assertions and the Scope of the Hearsay Rule" (1973) 9 Melbourne University LR 268 at 295. Another case to have given rise to certain misgivings in this regard is State v Galvan 297 N.W. 2d 344 (1980). In this case the court evaded the issue by labelling the evidence "assertive", and thus concluded that it was hearsay in terms of Rule 801. It would seem, however, that the evidence was clearly non-assertive. The many risks inherent in the evidence, however, probably induced the court to come to this conclusion. For a criticism of this case, see Wendy S Everett "Nonassertive Conduct and State of Mind Evidence in Iowa After Galvan: Bridges Over Troubled Hearsay Waters" (1981) 66 Iowa LR 985.

183 For a full discussion of state reform programmes, see ALRC, RP 3 Hearsay Evidence Proposal (1981) at 99-109.

184 NSWLRC Report on Hearsay (1978).

185 ALRC, RP 3, op cit note 183, at 105.

186 (1979) 53 ALJ 2 at 3-4.

187 Op cit note 183.

188 Clause 1(1).

189 ALRC, RP 3, op cit note 183, at 123.

190 Clause 3.

191 Clause 4.

192 Clause 6(1)(b).

193 Clause 6(2).

194 Clause 6(3).

195 Clause 7(1).

196 ALRC, RP 3, op cit note 183, at 123.

197 Id at 130.

198 Clause 17(1).

199 Clause 18.

200 Clause 19.

201 Finman, op cit note 9.

202 Wellborn, op cit note 87.

203 ALRC, RP 3, op cit note 183, at 121.

204 Id at 124.

205 1964 (1) SA 729 (C); this case was discussed fully at 278 et seq.

206 Fed. R. Evid. 403.

207 ALRC, RP 9 Hearsay Law Reform - Which Approach? (1982).

208 Id at 18-20.

209 James Bradley Thayer Preliminary Treatise on Evidence at the Common Law (1898) 522.

210 Edmund M Morgan and John MacArthur Maguire "Looking Backward and Forward at Evidence" (1937) 50 Harvard LR 909 at 921.

211 Ibid.

212 Charles T Mc Cormick "Tomorrow's Law of Evidence" (1938) 26 American Bar Association Journal 507.

213 Id at 511.

214 Id at 512.

Chapter X

CONCLUSION : SUGGESTIONS FOR LAW REFORM IN SOUTH AFRICA

What, then, are the choices facing the South African Legislature?

(A) To retain the status quo: This, I have argued, is untenable. The flaws in the common-law hearsay-structure make reform imperative, and the argument that the rule "works in practice" rests upon a curious blend of legal fiction and judicial licence.

(B) To abolish the rule and to allow all relevant evidence to be received subject to an assessment of its weight: The simplicity of this approach gives it much appeal, but, while it is certainly preferable to the present system, its innocuous facade belies certain serious drawbacks:

(i) It is too radical a departure from traditional hearsay theory - even more drastic in its consequences than the bitterly opposed Model Code and Uniform Rules - and is likely to elicit vociferous resistance from the legal profession.

(ii) Exclusion is a more effective mechanism than the evaluation of weight for dealing with hearsay of minimal probative value.

(iii) An exclusionary rule, by compelling the court to label evidence as either hearsay or non-hearsay, is more conducive to a proper recognition and assessment of the dangers and safeguards contained in such evidence.

(iv) In the absence of legislative guidance, it is possible that the courts would allow the traditional hearsay objections to colour their determination of relevance, thus leading to a resuscitation and re-statement of the same problems that currently bedevil the topic.

(v) A scientifically formulated standard for separating admissible and inadmissible hearsay would be more satisfactory than a vague, broad mandate to receive all relevant evidence subject to an evaluation of its weight.

(C) To devise scientific criteria for determining when hearsay should be received or excluded: This, it has been submitted, represents undoubtedly the most satisfactory solution to the problem. It raises, however, the problem of choice, as here the Legislature is faced with a variety of possible formulations:

(a) A general exclusionary rule qualified by defined exceptions: This is the approach of the common law, and it has been shown that a concept as slippery as hearsay is not comfortably accommodated within the rigid confines of precise categories. It lends itself, rather, to the

more flexible qualities of a judicial discretion sometimes to receive hearsay, a fact recognized by the drafters of the United States Federal Rules when the thirty specified exceptions of the Rules were supplemented by the two residual discretionary exceptions. It is impossible to compile a comprehensive list of acceptable hearsay categories, just as it is impossible to identify all relevant evidence, and, even if our recognized hearsay exceptions were rationalized, revised and expanded, such an approach, by its very nature, is doomed to failure. It could be argued that in South Africa the specific exception approach was dealt a mortal blow by the decision in Vulcan Rubber Works (Pty) Ltd v SAR & H,[1] which, in effect, terminated the expansion of the common law exceptions, and that the status quo may be salvaged by a statutory circumvention of this decision. That this would be a panacea is doubtful. In Canada, for instance, where the courts have rejected the restrictive view of the majority in Myers v DPP,[2] legislative reform has still been considered necessary.[3] The stark reality, it would seem, is that the category and label approach is conceptually defective in that it fails to come to grips with the variable character of hearsay. The border between acceptable and unacceptable hearsay is often very thin, and depends on several inter-dependent factors which defy precise ennumeration and which may only be garnered from the totality of the circumstances of each individual case.

(b) Defined exceptions qualified by a residual discretion to admit in certain prescribed cases: This approach, which was adopted in the Federal Rules, also gives rise to certain difficulties. If the residual exception is restrictively framed so as to apply only in particular, circumscribed areas, then one has not really remedied the problems encountered in (a) above, and the discretion is rendered impotent. If the provision is given a wide ambit, one runs the risk that the ensuing tension between the specific exceptions and the flexible residual provision may create uncertainty and induce the courts to seek asylum in the relative safety of the common law. It is clear that such a solution is an anomaly, as it creates a paradoxical hybrid between rigid rules and a wide discretion, and makes it difficult for a court to resolve difficult issues by resorting to original legislative intent.

The approach of the Federal Rules raises, furthermore, difficult problems of interpretation, as the courts are compelled to resolve questions of admissibility by referring to the language of the residual provisions rather than by adhering to the general spirit and policy underlying them. The ensuing plethora of interpretations has, apart from jeopardizing uniformity, given rise to constructions and decisions which are incorrect and undesirable. One particular problem that has plagued the courts concerns assertions which narrowly miss admissibility via one of the recognized categories but which

comply substantially with the requirements of the residual exceptions.[4] Problems such as these, it is submitted, may be avoided by jettisoning, once and for all, the category approach and by making discretion the central mechanism for controlling admissibility instead of a safety net for regulating the imperfections of a flawed system.

(c) A broad, unqualified discretion to admit hearsay in appropriate cases: As with the abolitionist view, this proposal is unlikely to find an enthusiastic audience among legal practitioners. However, unlike that solution, this approach may be counterproductive and lead, paradoxically, to retrograde results. For judges, subjected to the considerable demands and pressures of litigation, and cast into the very midst of the hearsay thicket, could hardly be blamed for evading its unyielding briers and resorting to the well-worn paths of the common-law exceptions. Few would be so bold as to blaze trails through the heart of this thicket - a task more appropriately assumed by the Legislature. Certainly legislative direction is necessary, but it should be a direction that would provide guidance instead of shackles; that would fortify and foster the judicial discretion rather than stifle it.

(d) The identification of various categories of hearsay, followed by general principles of admissibility rather than specific exceptions: This approach, endorsed by the

Australian Law Reform Commission,[5] runs into conceptual difficulties at both ends of the admissibility spectrum. At one end, it would not adequately cover all classes of reliable hearsay, no matter how carefully such classes are compiled; at the other end, the ennumerated categories would necessarily be widely defined, allowing hearsay of minimal probative value to be received. It was submitted above[6] that these defects could be cured by introducing both inclusionary and exclusionary discretions, but this would result in a system that was cumbersome and unnecessarily complex. It would, furthermore, create uncertainty as to the status of the specific principles, as the dual discretionary provisions would render them, in large measure, redundant or tautologous. Because the provisions of such a system would often encompass general situations rather than specific instances, the distinction between them and the residual discretions would tend to become blurred, and one would be left with a bifurcated system for determining admissibility. Each particular question would then have to be resolved by having recourse to both standards, thus giving rise to confusion and unnecessary problems of construction.

(e) A judicial discretion qualified by a set of non-comprehensive guidelines: Here, it is submitted, lies the solution to the hearsay dilemma. By liberating hearsay from its traditional maze of exceptions, it would be possible to come to grips with the true concep-

tual objections to its reception, and to make these objections central rather than incidental to the overall enquiry, viz the admissibility of reliable evidence. Such an approach, moreover, allows one to transcend the present debate concerning implied assertions, and to perceive hearsay as evidence raising particular objections or dangers. This obviates the need to investigate the somewhat abstruse distinction between evidence that gives rise to certain permissible inferences and implied hearsay assertions, and penetrates the very core of the problem by identifying hearsay-like dangers and reciprocal safeguards.

The challenge that faces the Legislature in this regard is four-fold:

(i) to formulate a satisfactory definition of hearsay that will identify any evidence raising these dangers;

(ii) to decide whether to adopt a general principle of exclusion or inclusion in respect of such evidence;

(iii) to lay down a set of guidelines that will shepherd a judge through the hearsay thicket without having his discretion unduly tempered; and

(iv) to create procedural safeguards to prevent undue prejudice to the adversary.

The drafting of such an enactment should, furthermore,

take into account the following factors:

(1) The origin of the hearsay rule, and, in particular, its emergence as both the 'child of the jury' and the 'product of the adversary system'.[7] Account must therefore be taken of, respectively, the prestige of the fact-finding process and the protection of the adversary. In the light, however, of the modern swing towards the latter conception of hearsay, together with the abolition of the jury in South Africa, it is submitted that greater emphasis should be placed on the second of these principles, although the first should not be entirely overlooked.

(2) The traditional rationale underlying the hearsay rule. Hearsay has traditionally been excluded because: (i) it contains certain intrinsic dangers; (ii) it brings into question other dangers, which are not peculiar to hearsay, but which are exacerbated by the absence of the standard curial procedural devices to which witnesses are normally subjected; (iii) the absence of these procedural devices may therefore cause prejudice to the adversary in the presentation of his case; and (iv) the admission of hearsay causes procedural inconvenience and difficulties.[8] The proposed judicial discretion should, therefore, be structured in such a way as to take account of these objections, focussing particularly on the traditional 'hearsay dangers' of insincerity, defective memory, faulty perception and accidental miscommunication, and the pre-

judice caused to the adversary through being deprived of the effective employment of the recognized procedural aids. Such an approach would be in accord with the views of Professor Schiff, who submitted that "judges should admit any item of hearsay evidence at a trial when the purposes of the hearsay rule within our litigation system would be served no more than barely under the particular circumstances".[9]

(3) Considerations of legal policy. The hearsay rule spans the straits between two conflicting evidentiary principles. On the one hand, it is desirable that all relevant evidence be received and evaluated by the trier of fact, and on the other, it is equally desirable that all witnesses testify subject to the 'ideal conditions' of the courtroom, where such evaluation may be properly conducted. The proposed discretion must therefore, of necessity, take account of the tension between these two poles and provide some yardsticks as to how these competing priorities may be resolved. In this regard, two factors warrant specific attention:

(i.) Necessity: Necessity and trustworthiness were the two elements identified by Wigmore[10] in his attempt to rationalize the common law exceptions to the hearsay rule. They were adopted by the United States federal courts as being the dual criteria for determining the

admissibility of hearsay,[11] and were subsequently modified for incorporation into the residual exceptions of the Federal Rules. As regards necessity, these provisions require that the proferred statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts".[12] The Australian proposal, on the other hand, comes to grips with the problem by setting out different conditions for the admission of hearsay, depending on whether the original declarant is available or unavailable to testify personally.[13]

(ii.) The interests of justice: The residual exceptions require that "the interests of justice [must] best be served by admission of the statement into evidence",[14] a requirement which the United States courts seem to have conflated with the constitutional confrontation rule of the Sixth Amendment.[15] This concept of protecting the interests of the accused also finds an echo in the Australian proposal, which distinguishes between the reception of hearsay in civil and criminal trials on the ground that "the criminal trial is premised on the view that we should minimize the risk of convicting the innocent even though this may result in the acquittal from time to time of the guilty".[16] It is submitted that this principle may beneficially be utilized in the formulation of the proposed discretion, thereby making allowance for the right of confrontation which has become inextricably fused with the

hearsay rule in the United States.[17]

(4) The meaning of 'hearsay'. In Chapter IV, it was shown that hearsay may generally be viewed in one of two ways. It may be seen as an extra-curial assertion offered to prove the truth of its contents, or, alternatively, as any evidence which rests for its probative value on the untested testimonial factors of an actor or declarant other than the testifying witness. The theoretical advantages of the latter view have been illustrated; it remains to determine whether this declarant-oriented approach is practicable in the light of the solution which I have submitted should be adopted.

Throughout this dissertation, one leitmotiv has run like a thread through the discussion: the conceptual superiority of the declarant-oriented perspective of hearsay over its assertion-oriented counterpart. Yet in most instances, the full acceptance of this line of thought has been thwarted by a major obstacle - its incompatibility with the common-law exclusionary rule. The proposed judicial discretion, on the other hand, complements perfectly the broad perspective afforded by such a definition. The union of these two concepts would allow the court to identify hearsay-like evidence and then to examine whether, on balance, the exclusion of such evidence is desirable. In short, the labelling of

an item of evidence as hearsay would merely state the question of admissibility, not solve it.

(5) The rôle of hearsay as a "marginal cost factor". It was submitted in Chapter III that the exclusion of an item of evidence is only justifiable if the total cost of receiving it exceeds the total benefit derived thereby.[18] It was further shown that it is fallacious, when applying this principle to hearsay evidence, to resolve the question of admissibility by comparing the probative value of such evidence (which represents total benefit) with only its hearsay cost (being that part of the cost caused by the hearsay quality of the evidence). This would be to mis-state the problem, and to ignore the other components of total cost. What, for instance, of the tendency of the evidence to cause confusion, waste of time, lengthy collateral issues etc? What, moreover, if such evidence possesses minimal probative value? Should it be received merely because all the customary hearsay dangers are substantially accounted for? It was demonstrated above that the rules governing hearsay and relevance represented two facets of the same problem, viz. admissibility. It would therefore be erroneous in the extreme to overlook this fact in formulating the overall enquiry at which the proposed judicial discretion is to be directed.

At first glance, it may appear that these two enquiries are capable of separate resolution, but, on closer examination,

this is shown to be impracticable. How, for instance, is a court to determine the relevance of opinion evidence which is also hearsay, without taking account of the hearsay dangers involved? Opinion evidence is generally admissible if the witness is in a better position than the court to draw the relevant inference,[19] an enquiry that necessitates examination of his memory and powers of perception and evaluation. How can the court assess these qualities when the hearsay character of the evidence renders them immune to curial scrutiny and cross-examination? It is, therefore, clearly impractical to divorce these two co-determinants of admissibility, and the only solution is an enquiry that conflates them: Hearsay evidence, accordingly, is only justifiably admitted when its probative value exceeds the sum of the disadvantages caused by its reception. This proposition has the added virtue of being consistent with accepted relevance theory.[20]

In the light of these observations, the following proposal is tentatively submitted as a model for legislation on this topic:

DRAFT PROPOSAL FOR HEARSAY REFORM

Section 1 - Definitions

(i) For the purposes of this Act and any other law, "hearsay evidence" means any evidence which does not derive its value solely from the credit to be

attached to the witness himself, but rests in part or in whole on the veracity and competence of some other person, hereinafter referred to as the "maker".

(ii) For the purposes of this Act, the "probative value" of an item of evidence means its logical tendency to show or indicate the material fact for which the evidence is offered.

Section 2 - Admissibility

(a) Subject to the provisions contained in [this] or any other law, hearsay evidence is inadmissible unless:

(i) its probative value exceeds the disadvantages caused by its reception;

(ii) its reception is in the interests of justice; and

(iii) the maker is unavailable to be called as a witness.

(b) In determining whether the probative value of any item of hearsay evidence exceeds the disadvantages caused by its reception in terms of s 2(a)(i), the court shall take into account all relevant factors including, but without necessarily allowing any of these or any other factors to be solely determina-

tive of the issue, the following:

(i) the trustworthiness of the evidence, and, in particular, the extent of any dangers that may arise as a result of relying on the sincerity, narrative competence and powers of memory, perception and evaluation of the maker; and

(ii) the extent to which the reception of the evidence raises procedural difficulties such as undue delay, waste of time, lengthy collateral issues, confusion or the misleading of the trier of fact.

(c) In determining whether the reception of an item of hearsay evidence is in the interests of justice in terms of s 2 (a)(ii), the court shall take into account all relevant factors including, but without necessarily allowing any one of these or any other factors to be solely determinative of the issue, the following:

(i) the extent of any prejudice that may be caused to the other party or parties by virtue of the fact that the maker is not subjected to cross-examination or any of the other standard devices to which a witness is ordinarily subjected; and

(ii) the nature of the proceedings - whether civil or criminal - and, in the latter instance, whether the evidence is tendered by or against the accused.

(d) For the purposes of s 2(a)(iii), the maker will be unavailable if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or is outside the Republic and it is not reasonably practicable to secure his attendance, or all reasonable efforts to find him have been made without success.

Section 3 - Notice

A party must, in any civil proceedings, give his opponent notice of his intention to adduce any item of hearsay evidence at least four days before the commencement of the proceedings. Provided that if such notice is not given, the evidence may, subject to the provisions of this Act, be admitted subject to such order as to postponement or costs, or both, as the court may consider fit.

COMMENTS ON THIS DRAFT PROPOSAL

Section 1 - Definitions

(i) The definition of "hearsay" is based on the formulation adopted in Jones on Evidence.[21] It is a classic declarant-oriented definition, akin to those endorsed by writers such as Tribe[22] and Lempert and Saltzburg.[23] The scope of this definition is extremely wide, bringing under the hearsay banner all evidence that raises particular dangers and objections, and avoiding the semantic and esoteric difficulties which invariably flow from defining hearsay as a particular kind of assertion. It is therefore irrelevant, for the purposes of this definition, whether a statement or act is intended as an assertion or not, or whether an assertion is express or implied. The enquiry, instead, revolves around the purpose for which an extra-curial act or statement is to be employed, i e whether or not it requires the court to treat the absent actor or declarant as a witness. This perspective of hearsay is in perfect harmony with the basic rationale underlying the common law rule and is vastly superior to the traditional assertion-oriented statements in coming to grips with implied assertions and other evidence lying on the borders of hearsay. Its functional simplicity serves also to alert the court to the fundamental dangers inherent in hearsay evidence, and dovetails with the flexible, discretionary approach to admissibility set out in s 2.

(ii) The definition of "probative value" is derived from a statement of Wigmore,[24] and finds favour with writers such as Mc Cormick[25] and Lilly.[26] It is also in line with how that concept is understood in South Africa.[27]

Section 2 - Admissibility

Section 2 (a):

The rule contained in this section is expressly made to operate "[s]ubject to the provisions contained in [this] or any other law" so as to take account of other statutory inroads into the law. The adoption of this draft proposal would, however, necessitate a re-examination and revision of some enactments, particularly Part VI of the Civil Proceedings Evidence Act[28] and the Computer Evidence Act.[29] These provide, respectively, for the admissibility of certain documents and computer prints-out, and it would be anomalous to subject such evidence to the technical requirements contained in those enactments while allowing other, less trustworthy hearsay to be admitted by way of the less restrictive measures set out in the above proposal. It would therefore be necessary either to amend these statutes by inserting residual discretionary provisions, or to repeal them and allow documentary and computer evidence to be governed by the same measures as other hearsay. The latter alternative, it is submitted, may be preferable in that it is simpler and engenders greater uniformity.

The rule in s 2(a) is stated in the negative, i e hearsay is inadmissible unless the three stipulated conditions are satisfied. The reason for this approach is that it is more in line with the common law than a positive formulation, and is therefore less likely to encounter resistance at the hands of legal practitioners. Lawyers are familiar with the traditional rôle of hearsay as an exclusionary rule, and the American experience demonstrates clearly the hazards of disturbing firmly-entrenched notions and principles.

The three conditions for admissibility, as qualified and explained in section 2(b), (c) and (d), create a delicate balance between, on the one hand, flexibility and judicial creativity, and, on the other hand, legislative guidance and direction. The wide wording used in the formulation of these conditions in s 2(a) is indicative of the extent to which admissibility is left to the discretion of the court, a notion which is further strengthened by the following factors:

(i) the court is empowered and, in fact, obliged to take account of "all relevant factors" in resolving the enquiries stipulated in subsections (b) and (c);

(ii) no attempt is made to list comprehensively these factors, and the matter is left to the discretion of the court; and

(iii) it is expressly provided that those factors that are listed are not to be considered as being either exhaustive or decisive of the issue.

There are, however, areas where the judicial discretion is curtailed, and where the courts are compelled to follow the Legislature's lead:

(i.) the court is obliged to exclude an item of hearsay evidence unless all three conditions are shown to be satisfied;

(ii.) one of these conditions (s 2(a)(iii)) is capable of simple factual determination, thus removing it entirely from the province of the judicial discretion;

(iii.) in the determination of the other two conditions (s 2(a)(i) and (ii)), the court is compelled to consider all relevant factors; if one or more such factors are not considered, the discretionary power of the court will not have been properly exercised, leaving the way open for a party to appeal against the court's finding; and

(iv.) in conducting the enquiries set out in s 2(b) and (c), the court is obliged to include in its investigation an examination of certain specific factors. Although these factors are not necessarily solely determinative of the issue, a failure to consider them will constitute an irregularity.

The result, therefore, is a qualified discretion, which must be judicially exercised and which provides guidance without unnecessary shackles. It ensures, in effect, that the courts follow a particular line of reasoning without limiting the factors that may be employed during the course of such reasoning. The proposal, in short, sets the lower limits of admissibility, and allows the court to resolve the remaining questions subject to a minimum of legislative interference. It is instructive in this regard to consider each of these three conditions in turn, in order to examine the rationale underlying their incorporation and the chain of reasoning the court is required to employ.

Condition (i):

This condition is central to the entire question of admissibility, and rests on the fundamental premiss that evidence is only beneficially received if the total benefit exceeds the total cost caused by its admission. It also embraces the rôle of hearsay as a marginal cost factor, as it measures the probative value of an item of hearsay evidence against all the disadvantages flowing from its reception. In s 2(b), the court is instructed to take account of all relevant factors in conducting this enquiry, but two sets of disadvantages are singled out as warranting particular attention:

Section 2(b)(i):

This provision compels the court to conduct a hearsay-danger analysis along the lines advocated by Professor Edmund Morgan in his well-known article, "Hearsay Dangers and the Application of the Hearsay Concept".[30] Implicit in this analysis is an assessment of the risks that may arise through relying on the testimonial factors of an actor or declarant who is not before the court, and an evaluation of the degree to which these risks may be reduced or eliminated by recourse to the circumstantial indicia of trustworthiness surrounding the making of the act or statement. By way of example, the court could consider the following factors:

(A) Factors relating to the danger of insincerity:

Whether the evidence was assertive or nonassertive; whether it was against the interests of the maker; whether there was any motive to falsify or misrepresent; the relationship between the maker and the parties to the case; whether or not the making of the act or statement preceded the controversy; whether it was subjected to cross-examination, the oath or any equivalent device designed for procuring the truth; whether it was voluntarily or spontaneously made; the status of the person by whom and to whom it was made; and the reputation of the actor/declarant for honesty.

(B) Factors relating to the danger of defective memory:

Whether any or substantial reliance was placed on the actor's/declarant's memory; the importance of the act or statement to the maker; whether the act or statement concerned the maker's own affairs or the affairs of another; the length of time that had elapsed between the act or statement of the maker and the event or condition it purported to describe; whether the evidence is first- or second-hand hearsay; and the amount of detail which the evidence contained.

(C) Factors relating to the danger of faulty perception:

Whether the maker had a proper opportunity to perceive the facts which his act or statement is offered to show; whether the facts were within his personal knowledge; whether the evidence is first- or second-hand hearsay; and whether there is any reason to doubt the maker's ability to perceive properly the facts in issue.

(D) Factors relating to the danger of accidental miscommunication: The manner in which the material facts were conveyed by the maker to the witness (i e whether oral or in writing); whether the maker's act or statement could have been motivated by a belief other than the one which it is tendered to establish; the simplicity or complexity of the act or statement; whether the evidence is first- or second-hand hearsay; and the

court's impressions of the ability of the witness to convey accurately the act or statement of the maker in the light of the peculiar susceptibilities of hearsay to erroneous transmission.

(E) Factors relating to the danger of erroneous evaluation: Where the evidence relies for its value on an inference or opinion drawn by the maker, the court should consider whether the maker was in a proper position to draw that inference; his qualifications; how much is known of the facts on which the inference is based; and whether there is any reason to question the maker's judgment.

Section 2(b)(ii):

This provision takes into account the other disadvantages of receiving an item of hearsay evidence and is based largely on Rule 403 of the Federal Rules of Evidence.[31] It incorporates those disadvantages which have traditionally been considered by our courts in the enquiry relating to "legal relevance".[32] The co-dependence of these two provisions, viz. ss 2(b)(i) and (ii), is a manifestation of the principle, expressed above,[33] that only when the two rules relating to hearsay and relevance are working in harness may a proper answer be found to the question of admissibility.

Condition (ii):

This condition is designed to give expression to the modern notion of the hearsay rule as the product of the adversary system of trial procedure. The primary consideration, therefore, is whether it is in the interests of justice that an item of hearsay evidence be admitted, and in this regard, two factors (inter alia) must be considered:

Section 2(c)(i):

Cognizance is taken here of the chief objection to hearsay evidence - the fact that it rests for its evidential value on the veracity and competence of a person who is not subjected to the standard "ideal conditions" [34] of the courtroom. According to Professor Schiff, the function of the hearsay rule is "to protect the opposing party against evidence of relevant matters presented in a fashion not satisfying the well-settled demands of witness examination in our trial system". [35] The learned writer then goes on to list eight such demands which characterize the in-court testimony of a witness but which are of no avail to the adversary in respect of hearsay evidence. [36] The extent of the ensuing prejudice may, it is submitted, be assessed by looking at the following dual enquiry:

(a) What utility would these procedural devices have

enjoyed? Each of these aids should be considered, but it is cross-examination that usually has the greatest potential for uncovering errors in perception, memory, narration and evaluation. Its value in exposing insincerity is somewhat less celebrated, although still by no means negligible.[37] It should be remembered, moreover, that because the adversary has been deprived of these devices, the focus falls upon the potential results of their skilful application.[38]

(b) What substitutes are there, if any, for the inapplicable procedural devices? Here regard may be had to the conditions under which the act or statement was made - was the maker under oath; did the adversary have the opportunity to question him?

Section 2(c)(ii):

One of the requirements for admissibility via the residual exceptions contained in the Federal Rules is that the reception of the proffered evidence be in the interests of justice.[39] As was pointed out above,[40] this requirement has been linked to the investigation regarding confrontation under the Sixth Amendment. This constitutional provision, it has been shown,[41] owes its origin to the premiss that it is desirable that the accused in criminal proceedings be given the opportunity to confront his accusers. However, as the United States Supreme Court

has found, this principle must occasionally yield to the dictates of public policy, and confrontation may be dispensed with where its utility is low or where the dual test of necessity and trustworthiness is satisfied.[42] Section 2(c)(ii) is designed to accommodate this experience; it alerts the court to the different priorities that apply in criminal proceedings - where the risk of convicting an innocent man necessarily carries more weight than the general need to receive all relevant evidence - without fettering the judicial discretion. The court would therefore be free to conclude that, on the facts of a particular case, the reception of an item of hearsay evidence would serve the interests of justice despite the deprivation of the accused's right to confrontation.

Condition (iii):

Trustworthiness and necessity were identified by Wigmore[43] as the essential criteria on which to predicate the admissibility of hearsay. The former element has been incorporated into this proposal in s 2(b)(i), where the court is obliged to assess trustworthiness by conducting the requisite hearsay-danger analysis; the third condition to s 2(a) (as qualified by s 2(d)) takes cognizance of the latter. The treatment accorded these two concepts is, however, strikingly different. Whereas the enquiry as to trustworthiness is left largely to the discretion of the court, subject only to the mandatory

hearsay-danger computation, necessity is removed entirely from the nebulous realm of discretion and given the hard substance of legislative control. It is tersely stated that hearsay evidence is inadmissible unless ... "the maker is unavailable to be called as a witness". This is followed in s 2(d) by a definition of unavailability, which is derived from Part V1 of the Civil Proceedings Evidence Act.[44]

The restrictive effort of this condition is justified, it is submitted, on grounds of legal policy. It was stated above[45] that the hearsay rule straddles two conflicting principles, viz. the need to subject witnesses to the ideal conditions of courtroom testimony and the need to receive all relevant evidence. This conflict, it is submitted, should only be resolved in favour of the latter where the maker is shown to be unavailable.[46] In the residual exceptions to the Federal Rules, a different approach is taken, and the proffered hearsay evidence is required to be more probative "than any other evidence which the proponent can procure through reasonable efforts".[47] Because of the potential uncertainty and problems of proof, it is submitted that this approach is not altogether satisfactory. It tends, furthermore, to conflate the hearsay rule with the best evidence rule, a union which is neither necessary nor desirable.[48]

Section 3 - Notice:

Because of the wide admissibility base created for hearsay evidence by sections 1 and 2, it is necessary to ensure that the adversary is not taken by surprise by its presentation at trial. To remedy this problem, the residual exceptions to the Federal Rules require the proponent to provide his opponent with notice of his intention to offer it "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it".[49] This provision, moreover, is made a prerequisite to admissibility, thus giving the courts, on the face of it, no latitude or scope for discretionary manoeuvre. Despite this apparent inflexibility, the United States courts have split on the issue of whether notice may, in appropriate cases, be dispensed with.[50] The majority view is in favour of admissibility where the proponent only becomes aware of the need to adduce such evidence after the trial has commenced,[51] whereas the Second Circuit has adopted a stricter approach,[52] maintaining that there is "no doubt that Congress intended that the requirement of advance notice be rigidly enforced".[53]

Academic opinion seems to be in favour of the more flexible approach,[54] and Sonenshein has suggested that the residual exceptions should be amended to conform to this view and to "rescue the courts that have adopted it from decisions

which are unquestionably correct as a matter of policy, but erroneous as a matter of law".[55]

In the light of these difficulties, it was decided to divorce the notice requirement from the conditions for admissibility, and to allow the court a wide discretion in dealing with a defaulting party. The court may, in such cases, refuse to receive the evidence, or, in its discretion, receive the evidence subject to any order as to postponement or cost which it deems fit.

Conclusion:

Over three decades ago, Professor Morgan once expressed the following sentiment:

> "If we were privileged to start anew and were unwilling to treat the hearsay objection as affecting weight rather than admissibility, we should do well to put in the category of hearsay all evidence which requires the trier to rely upon the use of language or the sincerity or the memory or the observation of a person not present and not subject to all the conditions imposed upon a witness. But we should have as the basis of the system the principle that all relevant evidence is admissible ... "[56]

Today, in South Africa, we have this privilege, as the hearsay rule is currently awaiting the attention of the Law Commission. An opportunity such as this is too valuable to waste by resorting to the spurious and illusory safety of traditionalism and orthodoxy - such retrogressive timidity has for too long hampered the reform of the hearsay rule in foreign countries. It is time for a

revaluation of out-moded notions and a bold change of perspective. Such a change, it is submitted, has been attempted in the draft proposal set out above. Although this proposal is my own, it is consistent with what may be garnered from the accumulated wisdom of many perceptive minds that have graced the law of evidence, and its claim to validity rests on the basic values underlying not only the hearsay rule, but also the adversary system that created it. I have attempted to expose the hearsay rule as merely being a functional instrument of the adversary trial, and, thereby, to create a holistic substitute for it, in which ostensibly disparate concepts fit harmoniously together. I have endeavoured to achieve this result (a) by effecting a linguistic purge, in which terms such as res gestae (in so far as it impinges on hearsay), implied assertions, nonassertive conduct, verbal acts, verbal parts of acts, double hearsay and many others are rendered redundant; (b) by conflating the exclusionary rules relating to irrelevance and hearsay, so as to yield a composite solution to the problem of admissibility; and (c) by reducing the hearsay concept to four elements - trustworthiness, probativeness, justice and necessity.

NOTES TO CHAPTER X

1 1958 (3) SA 285 (A).

2 [1965] AC 1001, [1964] 2 All ER 881. In Ares v Venner [1970] S.C.R. 608, the Supreme Court of Canada unanimously disapproved the view of the majority of the House of Lords that the courts may no longer create new common law exceptions to the hearsay rule. This approach was further adopted in Canadian Pacific Railway v City of Calgary [1971] 4 W.W.R. 241. For a discussion of both cases, see Stanley Schiff, "Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Canadian Bar Review 674 at 685-7.

3 For a brief account of this reform, see note 88 to Chapter V111. For a more detailed account see ALRC RP 3 Hearsay Evidence Proposal (1981) at 89-93, and also Rupert Cross "The Proposed Canadian Evidence Code and the Civil Evidence Act 1968" (1978) 56 Canadian Bar Review 306.

4 See p 399 ante.

5 See ALRC RP 3 Hearsay Evidence Proposal (1981). See, further, p 429 et seq.

6 At p 439 ante.

7 See Chapter II ante.

8 See, generally, Chapter III ante, where the rationale of the hearsay rule was discussed.

9 See Schiff, op cit note 2, at 674.

10 Wigmore Evidence V 3ed (1940) para 1420.

11 See 386 ante.

12 Clause (B) of Rules 803 (24) and 804(b)(5).

13 ALRC RP 3, op cit note 5, at 124.

14 Clause (C) of Rules 803 (24) and 804(b)(5).

15 See David A Sonenshein "The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule" (1982) 57 New York University LR 867 at 895. See, further, the cases that Sonenshein cited in notes 154.

16 ALRC RP 3, op cit note 5, at 121.

17 See Chapter III, pp 44 to 58 ante.

18 See p 70 ante.

19 See R v Vilbro 1957 (3) SA 223 (A). See, also, Wigmore Evidence V11 3 ed (1940) para 1918 and L H Hoffmann and D T Zeffertt South African Law of Evidence 3 ed (1981) 76-7.

20 See Hoffmann and Zeffertt, op cit note 19, at 17-19.

21 Jones on Evidence Civil and Criminal II 6 ed (1972) by Spencer A Gard 159.

22 Laurence H Tribe "Triangulating Hearsay" (1974) 87 Harvard LR 957 at 959.

23 R O Lempert and S A Saltzburg A Modern Approach to Evidence (1977) at 340-1.

24 J Wigmore A Student's Textbook of the Law of Evidence (1935) para 22 at 53.

25 C T Mc Cormick Handbook of the Law of Evidence 2 ed (1972) 436.

26 G Lilly An Introduction to the Law of Evidence (1978) para 10 at 22. See, also, Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 331-2, where a similar formulation of "probative force" is adopted.

27 See R v Trupedo 1920 AD 58 at 62-3. See, also, Hoffmann and Zeffertt, op cit note 19, at 17 and C W H Schmidt Bewysreg 2 ed (1982) 352.

28 Act 25 of 1965. The provisions of ss 33 to 38 inclusive of this Act apply mutatis mutandis to criminal proceedings by virtue of s 222 of the Criminal Procedure Act 51 of 1977.

29 Act 57 of 1983.

30 (1948) 62 Harvard LR 177. See p 29 ante.

31 Fed. R. Evid. 403 provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

32 See Hoffmann and Zeffertt, op cit note 19, at 17-19.

33 See p 469-70 ante.

34 See Fed. R. Evid. 801 Advisory Committee Note, where the following statement appears: "[T]he Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination."

35 Schiff, op cit note 2, at 681.

36 Id at 680-1. See, also, pp 346 to 351 ante for a full discussion.

37 See Morgan, op cit note 30, at 186.

38 See Schiff, op cit note 2, at 679.

39 Clause (C) of Rules 803 (24) and 804(b)(5).

40 At p 467 ante.

41 At p 45 ante.

42 See p 46 ante.

43 Wigmore, op cit note 10.

44 Section 34(1)(b) of Act 25 of 1965.

45 At p 466 ante.

46 See, also, Morgan, op cit note 30, at 218, where the learned writer submits that we "should treat the hearsay rule as an exception generally applicable only when the declarant is available but not present for cross-examination".

47 Clause (B) of Rules 803(24) and 804(b)(5).

48 See Vulcan Rubber Works (Pty) Ltd v SAR & H 1958 (3) SA 285 (A) at 296, where Schreiner JA stated: "Weaker evidence is not excluded by the availability of uncalled stronger evidence except in the case of documents ..." See, further, Hoffmann and Zeffertt, op cit note 19, at 29-31.

49 Rules 803(24) and 804(b)(5).

50 See Sonenshein, op cit note 15, at 901-5.

51 See, for example, United States v Carlson 547 F. 2d 1346 (8th Cir. 1976), United States v Leslie 542 F. 2d 285 (5th Cir. 1976), United States v Bailey 581 F. 2d 341 (3d Cir. 1978) and Furtado v Bishop 604 F. 2d 80 (1st Cir. 1979).

52 See, for example, United States v Oates 560 F. 2d 45 (2d Cir. 1977) and United States v Ruffin 575 F. 2d 346 (2d Cir. 1978).

53 United States v Ruffin, supra note 52, at 358.

54 J Weinstein and M Berger Weinstein's Evidence (1975), 803 (24) [01], and Sonenshein, op cit note 15, at 904-5.

55 Sonenshein, op cit note 15, at 905.

56 Morgan, op cit note 30, at 218.

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